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No. 99522

In The
Supreme Court of the United States

CITY OF MACEDONIA; JOSEPH MIGLIORINI,
IN HIS OFFICIAL CAPACITIES AS MAY AND JUDGE
OF THE CITY OF MACEDONIA'S MAYOR'S COURT,
Petitioners,

v.

CHRISTOPHER DEPIERO,
Respondent.

**Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

1. Can a mayor, who is vested with broad executive power, be a neutral and detached judicial officer for purposes of performing a perfunctory act in a Mayor's Court proceeding so as not to violate a litigant's right to due process of law.

2. Can a mayor, who is vested with broad executive power, be a neutral and detached judicial officer for purposes of presiding over a contested proceeding in Mayor's Court so as not to violate a litigant's right to due process of law.

3. Does a mayor engage in an executive function, and thereby implicate liability for a municipality as a policy maker when the mayor's decision-making relates to matters of court procedures that are interpreted under state law as a judicial function.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners/Defendants Below:

The Petitioners in this action are the City of Macedonia, Ohio and Joseph Migliorini, in his official capacities as Mayor and Judge of the City of Macedonia Mayor's Court. Mayor Migliorini in his individual capacity and officer Glen Nicholl, in his official and individual capacity, were also parties below but are not parties to this petition.

The City of Macedonia is a municipality which is incorporated under the laws of the State of Ohio. Joseph Migliorini was the duly elected Mayor of the City of Macedonia and, pursuant to laws of the State of Ohio, presided over the City of Macedonia Mayor's Court. Petitioners were defendants below in a civil rights action brought by Respondent.

Respondent/Plaintiff Below:

Respondent, Christopher DePiero, was the plaintiff in the lower court proceedings. Respondent commenced this action for the alleged violation of his constitutional right to due process of law.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the City of Macedonia and Joseph Migliorini, in his official capacities as Mayor and Judge of the City of Macedonia Mayor's Court, pray that a Writ of Certiorari issue to review a final judgment and order of the United States Court of Appeals for the Sixth Circuit.

JURISDICTION

On June 23,. 1999, the United States Court of Appeals for the Sixth Circuit entered judgment reversing the District Court's grant of summary judgment in favor of Petitioners on Respondent's claim that his right to due process of law was denied when Mayor Migliorini, who presided over certain Mayor's Court proceedings, directed a bench warrant to be issued for Respondent, and subsequently adjudicated his contested criminal case. *DePiero v. City of Macedonia, 180 F.3d 770 (6th* Cir., 1999). This Court has jurisdiction to adjudicate this controversy under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case implicates Respondent's right to due process of law afforded under the Fourth and Fourteenth Amendments to the United States Constitution. Respondent's claims were brought pursuant to 28 U.S.C. §1983. Respondent's claims also impact the validity of Ohio Revised Code §1905.01. The relevant constitutional and statutory provisions have been included in the appendix to this Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Underlying Facts

This lawsuit arises out of Respondent's claim that his due process rights were violated when he was subjected to proceedings in the Macedonia Mayor's Court presided over by the Mayor of Macedonia. Specifically, Respondent alleged that Mayor Migliorini was not a "neutral and detached" judicial officer by virtue of the broad executive power vested in the Mayor's office. As such, Respondent alleged that his constitutional right to due process of law was violated when Mayor Migliorini issued a bench warrant for his arrest and presided over his contested trial.

On December 4, 1994, Respondent was issued a parking ticket in Macedonia, Ohio for violating a Macedonia parking ordinance. On January 12, 1995, the Clerk of the Mayor's Court mailed a summons to Respondent's home address directing him to appear in Court on January 23, 1995. The summons warned that, "if you fail to appear at the time and place stated above, you may be arrested."

Respondent failed to appear in court on the date indicated in the summons. Mayor Migliorini, as Judge of the Mayor's Court, issued a bench warrant for Respondent's arrest. A criminal contempt charge was later brought against Respondent for his failure to appear in Mayor's Court.

On March 6, 1995, Respondent was stopped by the police in a neighboring municipality for an unrelated

traffic offense. Respondent was advised of the outstanding bench warrant and transported to Macedonia where he posted the Two Hundred Fifty Dollar ($250.00) cash bond. Respondent was arraigned and plead not guilty to the traffic and contempt charges against him.

On April 17, 1995, Respondent was tried in Mayor's Court before Mayor Migliorini. Respondent was found guilty of both the misdemeanor parking violation and the criminal contempt charge. He was ordered to pay One Hundred Fifty Dollars ($150.00) in fines plus court costs.

Respondent appealed his convictions to the Cuyahoga Falls Municipal Court pursuant to Ohio Revised Code §1905.25. Ohio Revised Code §1905.25 permits a *de novo* appeal of a Mayor's Court decision to the appropriate municipal court. On June 20, 1995, the charges against Respondent were dismissed upon motion of the city prosecutor.

Petitioner, Joseph Migliorini, is the duly elected Mayor for the City of Macedonia. As Mayor, he is vested with broad executive power. The Macedonia City Charter prescribes that the Mayor is the Chief Executive Officer of the City, Head of the Department of Public Safety, and exercises control over all departments and divisions thereof. (*Apx.* 127-129, Charter of the Municipality of Macedonia, Ohio, §3.03(a)). Moreover, the Mayor is empowered as the "chief conservator of the peace" and is responsible for preparing an annual budget and submitting it to City Council. (*Apx. 127-129,* Charter of the Municipality of Macedonia, Ohio, §3.03 (a)).

The Mayor's executive powers, however, are not unqualified or undelegated. In fact, the City employs a Finance Director who is responsible for managing the day to day finances of the City. (*Apx.* 138,139, Charter of Municipality of Macedonia, Ohio, §6.03). Additionally, the City employs a Police Chief and a Civil Service Commission. Consequently, the Mayor has no day to day involvement with the running of the City's finances or the administration of the police department. (*Apx.* 163, Affidavit of Mayor Migliorini).

In addition to the executive powers vested in the Mayor's office, the Mayor has certain legislative powers to preside over council meetings and cast a vote in the event of a tie. The Mayor is also vested with "all the judicial power granted from time to time by the general laws of the State of Ohio to mayors of municipalities." (*Apx. 130*, Charter of the Municipality of Macedonia, Ohio, §3.03 (d)). As authorized by Ohio Revised Code §1905.05 (*Apx.* 111), a separate magistrate was appointed to share with the Mayor the judicial duties of the Court.

The Ohio Constitution provides that the judicial power of the state is vested in the Ohio Supreme Court, courts of appeals, courts of common pleas, and "such other courts inferior to the Supreme Court as may, from time to time, be established by law." (*Apx. 101,* Ohio Constitution, IV, Section 1). Pursuant to this constitutional mandate, the Ohio General Assembly has enacted legislation permitting municipal corporations to establish courts whereby the mayor presides over prosecutions involving

violations of municipal ordinances. (*Apx.* 103, O.R.C. §1905.01) [1]

Pursuant to the constitutional and statutory authority extended, the City of Macedonia instituted a Mayor's Court for purposes of providing a forum wherein violations of municipal ordinances could be resolved. The City of Macedonia's general fund received an insubstantial amount of revenue from the operation of the Mayor's Court. Specifically, during 1995, the total revenue generated by the Mayor's Court equaled $176,244.57. Additionally, during 1996, the Mayor's Court generated $170,304.05 in fines and costs. The revenue generated from the Mayor's Court before factoring in the costs of operating the Court amounted to approximately two to three percent of the City's general fund. (*Apx.* 166), Affidavit of Tom DiLellio, Finance Director of the City of Macedonia).

B. Proceedings Below

On November 14, 1995, Respondent filed this action against Petitioners pursuant to 42 U.S.C. §1983 in the United States District Court for the Northern District of Ohio. Respondent alleged various state and federal causes of action against the Mayor, the City, and the ticketing police officer. Of significance, Respondent alleged that Chapter 1905 of the Ohio Revised Code, Ohio's Mayor's

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[1] O.R.C. §1905.01 provides that municipal courts may be established in "all municipal corporations" that are not the site of a municipal court. O.R.C. §1901.01 establishes municipal courts in approximately 122 municipal corporations. As a result, all mayors outside those specified corporations have the authority under state law to create a Mayor's Court.

Court Statute, was unconstitutional because the statute allowed a Mayor to adjudicate and sentence a defendant in a contested matter despite the fact that the Mayor's executive responsibility for revenue production and law enforcement prevented "him from acting as a disinterested and impartial judicial officer."

Additionally, Respondent alleged that Mayor Migliorini violated Respondent's constitutional rights by presiding over Respondent's contested criminal case when Mayor Migliorini was not a neutral and detached judicial officer by virtue of the authority vested in his office. Respondent further maintained that, by virtue of Mayor Migliorini's executive power, he lacked the authority to preside over any proceeding within the Mayor's Court including directing the issuance of a bench warrant when Respondent failed to appear in court.

On February 17, 1998, the District Court denied Respondent's Motion for Summary Judgment and granted Petitioners' summary judgment. (*Apx.* 70, Memorandum of Opinion and Order). The District Court concluded that, since Respondent failed to demonstrate that he was deprived of a right secured by the Constitution or laws of the United States, his claims under 28 U.S.C. §1983 failed as a matter of law. In so holding, the District Court applied Supreme Court precedent addressing the due process implications of Ohio's Mayors' Courts. The District Court concluded that the City of Macedonia did not receive a substantial portion of its general revenue from the costs and fees generated from the Mayor's Court. Moreover, the District Court concluded that the exercise

of Mayor Migliorini's executive authority did not rise to the level whereby he failed to be a neutral and detached judicial officer when presiding over Mayor's Court proceedings.

Respondent appealed the District Court's grant of summary judgment in favor of the Petitioners to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed the judgment of the District Court in part and reversed the judgment of the District Court in part. Specifically, the Sixth Circuit concluded that Ohio's Mayor's Court statute was not unconstitutional on its face. Moreover, the Court of Appeals affirmed the determination that the Mayor and the police officer were entitled to judicial and qualified immunity. It also affirmed the dismissal of the state law claims.

Notwithstanding the foregoing, the Sixth Circuit reversed the judgment of the District Court in part and concluded that, as a matter of law, Mayor Migliorini was not a neutral and detached judicial officer for purposes of presiding over contested Mayor's Court proceedings. In support of its decision, the Sixth Circuit concluded that Mayor Migliorini's executive powers placed him in "two practically and seriously inconsistent positions, one partisan and the other judicial." (*Apx.* 1, *DePiero v. City of Macedonia*, 180 F.3d 770 (6th Cir. 1999)). As such, the Court of Appeals concluded that Mayor Migliorini deprived Respondent of due process when he presided over the contested traffic and criminal contempt charges.

The Sixth Circuit also concluded that, because Mayor Migliorini was not "neutral and detached," he

specifically lacked the authority to preside over the Mayor's Court for purposes of issuing a bench warrant. The expansive language of the Sixth Circuit essentially held that a Mayor who is vested with broad executive authority as the Chief Executive Officer of a municipality lacks the authority to preside over any Mayor's Court proceedings. Such a declaration is functionally equivalent to a determination that Ohio's Mayor's Court statute is unconstitutional on its face. This determination is inconsistent with the provisions of federal and state law and inconsistent with the numerous decisions of this Court upholding the constitutionality of Ohio's Mayor's Courts.

SUMMARY OF ARGUMENT

The Sixth Circuits decision addressing Ohio's Mayor's Courts, presents serious questions of constitutional import, impacting in a State wide fashion upon a segment of Ohio's Judicial System and is a matter which should be settled by the united States Supreme Court. This Court has explicitly recognized that it is common to vest mayors with "inferior judicial functions" and that the "mere union of the executive power and the judicial power in him cannot be said to violate due process of law." *Tumey v. Ohio*, 273 U.S. 510, 534 (1927). Indeed, this Court has recognized that the test to be utilized in determining whether a proceeding before a mayor's court violates a litigant's constitutional right is whether the mayor's situation is one that offers a possible temptation to be biased:

> [T]he test is whether the Mayor's situation is one which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him to hold the balance nice, clear, and true between the state and the accused.

Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972), *quoting Tumey*, 273 U.S. at 532. A possible temptation may exist when the mayor's executive responsibility for the city's finances make him "partisan to maintain a high level of contribution from the mayor's court. "*Ward*, 409 U.S. at 60.

In *Ward*, this Court determined that, in light of the mayor's responsibility for maintaining the village finances, a possible temptation existed whereby he might be biased towards convicting a defendant in order to generate revenue for the city. The Court determined that, under such circumstances, the mayor was constitutionally prohibited from presiding over contested cases.

The *Ward* court limited its application to contested cases. Indeed, the Court specifically noted that it expressed no view on whether a mayor with broad executive power had the authority to act in a ministerial capacity in presiding over a mayor's court:

> The question presented on this record is the constitutionality of the mayor's participation in the adjudication and punishment of defendant in a litigated case where he elects to contest the charges

> against him. We intimate no view that it would be unconstitutional to permit a mayor or similar official to serve in essentially a ministerial capacity in a traffic or ordinance violation case to accept a free and voluntary plea of guilty or *nolo contendere*, or forfeiture of collateral, or the like.

Id. at 62, footnote 2. In this case, the Sixth Circuit impermissibly expanded the test articulated in *Ward* for determining the potential due process implications of a mayor's court proceeding.

First, the Sixth Circuit invalidated Mayor Migliorini's conduct in presiding over a contested criminal case based solely upon the broad executive authority vested in his office. In so doing, the Court ignored the fact that the City of Macedonia only received an insubstantial amount of revenue for its general fund from the fees and costs generated by the Mayor's Court and ignored the fact that Mayor Migliorini did not exercise day-to-day control over the City's finances. The Sixth Circuit decision is not only in conflict with this Court's prior precedents, but in conflict with a decision of the Ohio Supreme Court wherein it was determined that a mayor of a village with broad executive authority does not violate a defendant's constitutional right to due process of law. *Village of Covington v. Lyle*, 69 Ohio St.2d 659 (1982), syllabus.

Second, the Sixth Circuit decision impermissibly expanded the application of the *Ward* test to ministerial functions performed by a mayor in a mayor's court

proceeding. Specifically, the Sixth Circuit concluded that, inasmuch as Mayor Migliorini was vested with broad executive authority, he lacked the authority to perform the perfunctory act of *issuing a bench warrant* when Respondent failed to appear before the court. In so holding, the Sixth Circuit specifically reviewed the issue reserved by *Ward* and concluded that, a mayor, acting in a ministerial capacity and presiding over a mayor's court proceeding, *per se* violates a litigant's right to due process of law.

The Sixth Circuit decision contradicts its own prior precedents wherein it concluded that the taking of a no contest plea in a mayor's court proceeding does not raise the same procedural safeguards as presiding over a contested mayor's court proceeding:

> The fact that the mayor makes a finding of guilt or not guilty after an explanation of the circumstances of the case does not elevate the taking of a no contest plea to the level of an adjudication of guilt after a not guilty plea, in which a defendant is contesting the charges brought against him. *** This procedure simply does not require the same safeguards as the complete discretion involved in an adjudication of a plea of not guilty, in which the facts alleged in the complaint are very likely in dispute.

Micale v. Village of Boston Heights, 1997 U.S. App. Lexis 10098 (6th Cir. 1997) (*Apx.* 169) Thus, in *Micale*, the Sixth Circuit concluded that the taking of a no contest plea

was a ministerial function and that the same due process safeguards were not implicated by the mayor when performing ministerial functions as opposed presiding over contested matters.

In this case, the Sixth Circuit's determination that Mayor Migliorini lacked authority to preside over any mayor's court proceedings by virtue of the broad executive power vested in his office is tantamount to a declaration that no mayor with broad executive powers may constitutionally preside over Mayor's Court in Ohio. Such a determination is contrary to this Court's precedents and in conflict with the Ohio Supreme Court. The ruling and potential liability now faced by Ohio mayors have deprived municipal corporations of their constitutional and statutory rights to create and administer inferior judicial tribunals.

REASONS FOR GRANTING THE WRIT

I

THE SIXTH CIRCUIT EFFECTIVELY RENDERED THE ACTIONS OF ALL OHIO MAYORS, WITH BROAD EXECUTIVE POWERS PRESIDING OVER MAYOR'S COURT, UNCONSTITUTIONAL OHIO'S MAYOR'S COURT UNCONSTITUTIONAL BY CONCLUDING THAT A MAYOR WITH BROAD EXECUTIVE POWER LACKS AUTHORITY TO PRESIDE OVER MAYOR'S COURT PROCEEDINGS. SUCH DECISION IS IN CONFLICT WITH THE OHIO SUPREME COURT DECISION IN *VILLAGE OF COVINGTON v LYLE,* 69 Ohio St.2d 659 (1982).

A.

The Sixth Circuit incorrectly extended the *Ward* analysis in determining whether a mayor with broad executive power has the authority to perform perfunctory acts in Mayor's Court such as the issuance of a bench warrant.

The Sixth Circuit's determination has a profound impact on the operation and administration of Mayor's Courts throughout the State of Ohio. In fact, the decision has resulted in Mayor's Courts across the State of Ohio: 1) refusing to sit in judgment on any contested case regardless of how minor; 2) refusing to issue perfunctory bench warrants for failures to appear; 3) refusing to accept pleas of guilty or no-contest; 4) refusing to rule on such mundane motions as a motion to continue; and (5)

refusing to engage in any other administrative duties which are inherent in any judicial court. Some Mayor's Courts have hired magistrates and other courts, such as Macedonia's, have increased the volume and types of matters being handled by their already existing magistrate.

Many Mayors' Courts have simply transferred cases properly before them to municipal courts having jurisdiction. This has not only placed an increased burden on municipal courts to deal, for the first time, with the nuances of local ordinances from Mayor's Court jurisdictions, but places an undue strain upon municipal officials and witnesses who must travel to attend proceedings at distant courts (in some instances there is only one municipal court in a given county). These practices also pose an inconvenience to many defendants, especially residents of the municipalities in which the charges originate, to travel to courts which are a further distance away only to find that these municipal courts may, in fact, prove less responsive.

The due process implications of Ohio's Mayor's Courts have been the subject of this Court's scrutiny on three separate occasions. In *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court overturned a plaintiff's conviction in a mayor's court on the basis that the mayor had a direct pecuniary interest in the outcome of the proceeding. The plaintiff in *Tumey*, was convicted and fined in Mayor's Court for possessing liquor in violation of Ohio Prohibition Act. Under the Prohibition Act, the mayor's salary was comprised of fees and costs levied against alleged violators of the Act. Consequently, the mayor

stood to gain financially if he convicted the defendants before him of violating the Act. In light of the mayor's direct pecuniary interest in the outcome of the case, this Court concluded that the defendant's right to due process of law was violated.

The *Tumey* court declined to hold, however, that any time a mayor performs a judicial function there is a *per se* violation of a litigants due process right. The Court stated as follows:

> It is, of course, so common to vest the mayor of villages with inferior judicial functions that the mere union of the executive power and the judicial power in him cannot be said to violate due process of law. The minor penalties usually attaching to the ordinances of a village council, or to the misdemeanors in which the mayor may pronounce final judgment without a jury, do not involve such addition to the revenue of the village as to justify the fear that the mayor would be influenced in his judicial judgment by that fact.

Tumey, 273 U.S. at 534.

Less than a year after *Tumey*, the Supreme Court concluded that a plaintiff's conviction under Ohio's Prohibition Law did not violate due process. *Dugan v. Ohio*, 277 U.S. 61 (1928). The Court reasoned that the mayor in *Dugan* did not have exclusive executive power and, thus, his connection to the village fund was remote. The court further reasoned that, unlike the mayor in

Tumey, the mayor in *Dugan*, did not "receive a salary which depended on whether" the defendant was convicted.

Finally, in *Ward v. The Village of Monroeville*, 409 U.S. 57 (1972), the Supreme Court struck down a plaintiff's traffic violation in mayor's court on due process grounds. Although the mayor in *Ward* did not have a direct financial interest in the cases tried before him, the mayor had wide executive powers and a substantial portion of the village income was derived from the fines, forfeitures, costs, and fees imposed in mayor's court. In fact, the fines for the village mayor's court constituted approximately fifty percent (50%) of the village's general fund. Based on those facts, the Court concluded that

> the Mayor's executive responsibilities for village finances may make him partisan to maintain a high level of contribution from the mayor's court.

Id. at 60.

The *Ward* court defined the test for determining the constitutionality of a mayor's court proceeding as being whether the mayor's situation was one which would offer a "possible temptation to the average man as a judge to forget the burden of proof." *Id.* at 60.

In this case, the Sixth Circuit improperly expanded the *Ward* test by concluding that Mayor Migliorini did not have the authority to preside over mayor's court proceedings because he possessed broad executive powers over the administration of the City of Macedonia. Indeed, the breadth of the Sixth Circuit decision is inconsistent with its recent decision in the *Micale* v. *Village of Boston*

Heights, 95-3284, U.S. App. Lexis 10098 (6th Cir. 1997) (*Apx.* 169).

In *Micale*, the Court addressed allegations of due process violations stemming from a misdemeanor plea of no contest which resulted in a finding of guilt and the imposition of a fine and court costs. The Court concluded that the taking of a no contest plea was a ministerial function and that the same due process safeguards which were implicated by a mayor who presided over a contested case were not implicated in taking a no contest plea:

> We find that the Mayor acted in ministerial role when taking Micale's plea of no contest. Micale's due process rights were not violated.

Id.

Based upon the foregoing, the Sixth Circuit incorrectly concluded that Mayor Migliorini's perfunctory act of issuing a bench warrant violated Respondent's due process rights. The analytical concern raised by a mayor vested with broad executive power and a substantial interest in the financial outcome of the matter is not present in this instant.

B.

The specific finding of the Sixth Circuit that the Mayor's issuance of a bench warrant violated due process is contrary to this Court's ruling in *Tumey* and its progeny and constitutes an unprecedented invalidation of bench warrants.

In this case, the Sixth Circuit went to great lengths to discuss a Mayor's powers of appointment over police officers (even though qualified by Civil Service), and to note that the Mayor, under Charter, was the "chief conservator of the peace" and shall "cause all laws to be enforced." These references were made in an obvious effort to justify the Circuit Court's rationale declaring the Mayor's adjudication of contested cases a violation of due process. The Circuit Court's rationale, however, is wholly inapplicable to bench warrants issued when a defendant fails to appear pursuant to a court issued summons.

Petitioner recognizes the conventional requirements for the issuance of arrest warrants as being based on oath or affirmation pursuant to the Fourth Amendment. Bench warrants, however, do not have the same requirements nor does their issuance call for the same analysis. The Sixth Circuit's conclusion that the same considerations that invalidate the Mayor's sitting in judgment in a contested case invalidates the issuance of a bench warrant is inconsistent with controlling precedent.

The Sixth Circuit analyzed numerous cases dealing with the validity of arrest or search warrants being solicited by those in law enforcement. *See e.g., Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Johnson v. United States*, 333 U.S. 10 (1948); and *United States v. Weaver*, 99 F.3d 1372 (6th Cir. 1996). These cases, however, do not apply to the facts of this case and illustrate the misguided analysis utilized by the lower court

The appropriateness of an arrest "...being judged by the officer engaged in the often competitive enterprise of ferreting out crime." was not at issue in this case. *Johnson* 333 U.S. at 14.It is uncontested that the actions of Mayor Migliorini did "not serve merely as a rubber stamp for the police." *Weaver*, 99 F.3d at 1376.

There are a few matters more perfunctory and akin to a ministerial act than the issuance of an arrest warrant for an individual who has failed to appear in court after a summons was issued by the court clerk. If a defendant fails to appear pursuant to such summons, a decision to issue a warrant in order to maintain the integrity of the court system, whether by clerk, magistrate, mayor, or other judge, is entirely appropriate. Such decision does not implicate a finding of either guilt or innocence of the defendant in any pending matter. It does not arise from the judgment of the credibility of any law enforcement officer or involve an assessment of any fine or criminal penalty against a defendant.

The issuance of the bench warrant by Mayor Migliorini, should not constitute a violation of due process. The Mayor was not requested to issue the warrant by a law enforcement officer. As such, the issuance of the warrant by Mayor Migliorini should not raise any due process concerns

Moreover, the conduct of a Mayor who presides over a contested matter should not be viewed to retroactively invalidate the issuance of a bench warrant. It is well established that bench warrants for failure to appear are valid and based upon a judge's probable cause.

U.S. v. Evans, 574 F.2d 352, 355 (6th Cir. 1978). It is unquestioned that courts have the inherent authority to issue bench warrants. *In Re Grand Jury Proceedings*, 658 F.2d 211 (3rd Cir. 1981) (issuance of bench warrant for failure to comply with Grand Jury subpoena).

Bench warrants, as well as warrants issued upon indictment, have received different treatment and analysis under the law than the conventional concept of an arrest warrant which is issued upon a determination of probable cause based upon oath or affirmation. Not only are warrants which flow from Grand Jury indictments and capias' or bench warrants arising from failures to appear different from arrest warrants in the conventional sense, but such has caused even one federal judge to comment, "I am satisfied that a bench warrant is not the type of warrant referred to in the Fourth Amendment." *U.S. v Gobey*, 92, CR 93, 1992 U.S. Dist. Lexis 22060 (Dist. of Colorado, September 12, 1992) (*Apx.* 192). .

Indeed, if bench warrants were to be treated as warrants in the conventional sense, such would require the accompaniment of an oath or affirmation as prescribed in the Fourth Amendment. It is clear that the treatment which the Sixth Circuit gave to the issuance of Mayor Migliorini's bench warrant was inappropriate in that the Court assumed it was dealing with arrest warrants in the conventional sense and the particular considerations attendant thereto.

It is difficult to reconcile the Sixth Circuit's decision in this case with its decision in *United States v. Bennett*, 170 F.3d 632 (6th Cir. 1999). In *Bennett*, the

Court held that a county circuit court clerk could issue a search warrant and be considered neutral and detached even though it was contended that the clerk was of the same political party as the commonwealth's attorney, ran a partisan race to be elected to her post, and had attended the same fundraisers as the commonwealth's attorney. *Id.* at 637. Petitioner does not disagree with *Bennett* but notes that the Sixth Circuit's decision in upholding a warrant issued by a clerk is inconsistent with the Court's finding in this case because the Mayor's issuance of the warrant was generated only by a failure of a Respondent to appear pursuant to a summons issued by the Court over whom the Mayor presides and he would have fewer motives to be biased than the Clerk.

In *United States v. Spencer*, 684 F. 2d 220, 223 (2nd Cir. 1982), the Court held:

> [T]he decision of the New York City Criminal Court Judge to issue a Bench Warrant constituted a finding made by a neutral magistrate that Spencer had failed to appear in a pending criminal matter. We recognize that its issuance did not amount to a judicial finding of probable cause to arrest in the traditional sense. ....

Moreover, it has been recognized that a separate oath or affirmation supportive of probable cause in the traditional sense is not required in the grand jury context wherein it has been concluded that in the event of an indictment, such "... requires the issuance of an arrest

warrant without further inquiry." *Gerstein v. Pugh*, 420 U.S. 103, 118 (1975) (*citations omitted*).

II

THE SIXTH CIRCUIT DETERMINATION THAT A MAYOR WITH BROAD EXECUTIVE POWERS, EVEN IN THE ABSENCE OF SUBSTANTIAL FINANCIAL MOTIVATING FACTORS, *PER SE* VIOLATES THE DUE PROCESS CLAUSE WHEN HE SITS IN JUDGMENT ON CONTESTED MAYOR'S COURT CASES IS IN CONFLICT WITH THE OHIO SUPREME COURT DECISION IN *VILLAGE OF COVINGTON v. LYLE, 69 OHIO ST.2d 659 (1982).* SUCH DECISION ALSO CONFLICTS WITH THE UNITED STATES SUPREME COURT'S THREE PRIOR CASE DECISIONS IN *TUMEY, DUGAN* AND *WARD.*

The Supreme Court has found no fatal defect in the over-arching system that permits a Mayor simultaneously to exercise some combination of executive and judicial functions. In fact, on three separate occasions the United States Supreme Court has addressed constitutional challenges to certain exercises within Ohio Mayor's Courts. See *Tumey v. Ohio*, 273 U.S. 510 (1927), *Dugan v. Ohio*, 277 U.S. 61 (1928), *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

This Court has previously upheld the constitutional validity of Ohio Mayor's Courts generally and has also refused to invalidate actions of a Mayor's Court because

of a Mayor's broad executive powers even when presented with such facts. Indeed, the only grounds upon which the United States Supreme Court has previously invalidated actions of a Mayor's Court were related to the substantiality of a Mayor's Court revenue or a mayor's direct financial interest.

The Sixth Circuit based its decision in this case, not on a question of substantiality of net revenues generated by the Mayor's Court, nor on a Mayor's personal financial interest therein, but rather upon the stated question:

> Whether the level of executive authority vested in the Mayor of Macedonia is broad 'so that it becomes reasonable to question [his] impartiality even if he collects a fairly small amount of general fund revenues through the Mayor's Court.'

(*Apx.* 15, *DePiero v City of Macedonia* , 180 F.3d 770 (6th Cir. 1999), citing *Rose v. Village of Peninsula,* 875 F. Supp. 422 (N.D. Ohio 1995).

The Sixth Circuit, therefore, has blazed a new trail in applying a *per se* rule of unconstitutionality in construing the executive powers conferred upon a Mayor in deviation from the prior precedent of this Court. Further, the Sixth Circuit has disregarded the *de facto* role and functioning of that Mayor, stating:

> [Although a Mayor may] delegate administrative responsibilities ... [such] dilutes neither the power with which he is

> vested nor his accountability for law enforcement or the fiscal help of the municipality as its chief executive.

(Apx. 24, 25 *DePiero*). Such a determination is unfounded.

III.

THE SIXTH CIRCUIT'S DETERMINATION THAT WHEN A MAYOR SITS IN JUDGMENT ON CONTESTED CASES AND ISSUES BENCH WARRANTS, HIS ACTS ARE NOT JUDICIAL BUT EXECUTIVE IN NATURE AND CONSEQUENTLY CONSTITUTED CITY POLICY, IS CONTRARY TO THE PRINCIPLES SET FORTH IN *MONELL v. DEPARTMENT OF SOCIAL SERVICES, 436 U.S. 65 (1978); JETT V. DALLAS INDEPENDENT SCHOOL DISTRICT,* 491 U.S. 701 (1989) AND THE RELEVANT OHIO PRECEDENT

It is acknowledged that the Mayor has had the discretion to decide whether or not to establish a Mayor's Court in the first instance. The Mayor's decision concerning whether to create a Mayor's Court may be construed as an executive decision by the Mayor, as policy maker of the City. However, unless the decision to create a Mayor's Court, in and of itself, constitutes an unconstitutional act, then no liability under *Monell* would flow to the City. Mayor's Courts, in and of themselves, are not unconstitutional and even the draconian interpretation by the Sixth Circuit of Macedonia's Mayor's

Court allows for the propriety of court functions conducted by Macedonia's Magistrate. The Court itself is not unconstitutional, and the decisions as to how to administer the court are judicial in nature. In this case, the Sixth Circuit properly extended absolute immunity to the Mayor, by concluding that the Mayor's actions, associated with the trial of a contested case as well as the issuance of a bench warrant, were functions which were judicial in nature. Yet, the Sixth Circuit also concluded that the decision to conduct such activities were in the nature of an executive function, thereby categorizing such decisions as constituting an official policy of Macedonia.

It is axiomatic that courts have inherent powers to create their own rules and procedures for case scheduling assignment and handling. Indeed, the Supreme Court of Ohio has held that "[T]he power to make rules of procedure is inherent in the judicial department." *The Cleveland Railroad Co. v. Halliday*, 127 Ohio St. 278, 283 (1933). Moreover, pronouncements of statutory authorization are "...only declaratory of the inherent rule-making powers already existing in Courts." *Id. Accord, Kohler v. Powell,* 115 Ohio St. 418 (1926).

This Court in *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989), stated that the proposition under *Monell* as to whether a governmental official is vested with the authority to make official policy is a question of state law. The Sixth Circuit's failure to apply state law conflicts with *Jett*. *Accord, City of St. Louis v. Praprotnik,* 485 U.S. 112, 124 (1988). The Sixth

Circuit's decision is in conflict with Ohio Supreme Court Decisions which construe decision making in the Mayor's Court as a judicial function, rather than executive one.

In *State ex rel Fisher v. Burkhardt*, 66 Ohio St.3d 189 (1993), the Supreme Court of the State of Ohio concluded that a Mayor's decision dealing with the collection of court costs in all bond forfeiture cases was determined to be an action within the Mayor's judicial capacity, even though such was not pertaining to an individual case. The *Burkhardt* decision demonstrates that when a Mayor makes a decision to personally perform a judicial act, the act constitutes a judicial and not an executive function.

It has also been held that a municipality's operation of the Mayor's Court, in order to enforce the laws of the state and its political subdivisions, is an exercise of a judicial function and the City is immune from liability for any action taken by the Mayor in his judicial capacity. *Wilson v. Neu*, 12 Ohio St.2d 102 (1984).

The Sixth Circuit's decision in *DePiero* is also in conflict with the Ninth Circuit decision in *Eggar v. City of Livingston*, 40 F.3d 312 (9th Cir. 1994), *cert. denied* 515 U.S. 1136. The Ninth Circuit in *Eggar* appropriately looked to state law for determination of whether a judge's actions constituted municipal policy making. In determining that the judge was not a municipal policy maker, the Court in *Eggar* stated:

> The judge's failure to follow state law or federal constitutional law does not transform his "cattle-call" method of counseling into municipal policy making. As state law makes clear, the judge's obligation to address the rights of defendants arises from his membership in the state judiciary. It is lamentable, but irrelevant that he failed miserably to meet this obligation under both state and federal standards: he simply is not a municipal decision maker in this context.

Eggar, 40 F.3d at 315.

The Mayor of Macedonia, as Judge of the Macedonia Mayor's Court is simply not a policy maker for the City of Macedonia within the meaning of *Monell*, its progeny, and Ohio law.

CONCLUSION

Notwithstanding the fact that issues concerning the constitutionality of actions in Ohio Mayors' Courts have been subjected to analysis before the United States Supreme Court on three separate occasions, including an analysis of Mayors' Courts with broad executive powers, this Court has never struck down any Mayor's Court action based upon the mere existence of strong executive powers. Indeed, the only occasions upon which the conduct of a Mayor's Court has been invalidated by this Court has been in those situations where the Mayor, sitting in judgment on a case, had either a direct financial interest or the financial

revenues derived from that Mayor's Court were substantial. Such financial infirmities are not present in the instant case.

The Sixth Circuit in this case has, for the first time, invalidated, upon constitutional grounds, proceedings within a Mayor's Court beyond the trial of a contested matter so as to not only expressly invalidate the issuance of bench warrants, but implicitly eviscerate the Mayor's taking of pleas of guilty or no contest and in administering the Court. Such decision is contrary to decisions of the Supreme Court of Ohio, other Sixth Circuit decisions, and the cited pronouncements of this Honorable Court.

Further, the Sixth Circuit in *DePiero* misapplied the *Monell* doctrine and the *Jett* decision in not considering state law precedent. Such Ohio precedent requires the conclusion that the Mayor's acts were judicial in nature and could not be construed as an exercise of executive powers implicating a finding of the creation of a municipal policy. The Sixth Circuit's interpretation also conflicts with Ninth Circuit precedent.

Petitioners pray that Certiorari be issued so that this Honorable Court may resolve the weighty constitutional issues presented and clarify the appropriate constitutional role of Mayors in the Mayor's Courts of Ohio.

Respectfully submitted,

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Counsel for Petitioner
**Counsel of Record*

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRISTOPHER DEPIERO

Plaintiff-Appellant,

6th Circuit
Court of Appeals
Filed 6/23/99

V. No. 98-3292

CITY OF MACEDONIA; JOSEPH MIGLIORINI, in his official capacity as Mayor and Judge of the City of Macedonia's Mayor's Court, and in his Individual capacity; GLENN NICHOLL, in his official capacity as patrolman for the City of Macedonia, and in his individual capacity,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 95-02405-Patricia A. Gaughan, District Judge.
Argued: March 10, 1999
Decided and Filed: June 23, 1999

Before: MERRITT, KENNEDY, and FARRIS,* Circuit Judges.

COUNSEL ARGUED: Augustin F. O'Neil, Akron, Ohio, for Appellant. John G. Peto, REMINGER & REMINGER CO., L.P.A., Cleveland, Ohio, for Appellee. **ON BRIEF:** Augustin F. O'Neil, Melissa Graham-Hurd, Akron, Ohio, for Appellant. John G. Peto, REMINGER & REMINGER CO., L.P.A., Cleveland, Ohio, for Appellee.

OPINION

KENNEDY, Circuit Judge. We are called upon in this appeal to determine the constitutionality of the plaintiff's conviction in the Macedonia, Ohio Mayor's Court. After being prosecuted in the Macedonia Mayor's Court on traffic misdemeanor and contempt charges, plaintiff Christopher DePiero ("Plaintiff') filed suit under 42 U.S.C. § 1983 against defendants the City of Macedonia, Ohio, its mayor, Joseph Migliorini, in his official and individual capacities, and Officer Glenn Nicholl, in his official and individual capacities, alleging the denial of substantive and procedural due process rights. Plaintiff now appeals the district court's grant of summary judgment for the defendants and denial of his own motion for summary judgment on Counts I and 11 of his complaint, which claimed that Ohio Revised Code §§ 1905.01 et seq., the statute authorizing mayor's courts, is facially unconstitutional, and that plaintiff's trial in the Macedonia Mayor's Court deprived him of due process

*The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

because Mayor Migliorini was not a "neutral and detached" magistrate. Plaintiff also appeals the district court's dismissal of Counts 111, IV and V of his complaint, which respectively alleged: deprivation of his right against unreasonable seizure by determination of probable cause and issuance of an arrest warrant by a mayor who was simultaneously a "law enforcement officer;" deprivation of procedural due process by issuance of a parking citation containing no information as to. how to contest the complaint and a claim for damages against Officer Nicholl under 42 U.S.C. § 1983 for violating his rights under the Fourth Amendment by issuing a traffic ticket citing an ordinance without probable cause to believe plaintiff had violated that ordinance. Finally, plaintiff also appeals dismissal of his pendent state claim for malicious prosecution.

For the reasons set forth below, we **AFFIRM** in part and REVERSE in part.

I. FACTUAL BACKGROUND

On December 4, 1994, plaintiff was issued a parking ticket in Macedonia, Ohio by police officer Glenn Nicholl ("Officer Nicholl") for violating Macedonia Codified Ordinance §351.12.[1] Although the citation itself did not

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[1] The Ordinance under which plaintiff was cited is captioned "Prohibition Against Parking on Streets or Highways" and provides in pertinent part:

> Upon any street or highway outside a business or residence district, no person shall stop, park or leave

specify where, when or how plaintiff might contest the complaint, a hearing on the citation was docketed in Macedonia Mayor's Court for December 27, 1994. After plaintiff failed to pay the ticket or appear in court, a summons was mailed to his home address on January 12, 1995 ordering him to appear in court on January 23, 1995 at 10:30 A.M. The summons warned, "If you fail to appear at the time and place stated above, you may be arrested." On February 7, 1995, after plaintiff failed to pay the fine for the violation or appear to contest the ticket in Mayor's Court, Mayor Joseph Migliorini issued a bench warrant for plaintiffs arrest and set bond at $250.00. The warrant was issued by Mayor Migliorini as "Magistrate/Mayor." As a result of plaintiffs failure to appear in Mayor's Court, a criminal contempt charge was also brought against him.

On March 6, 1995, plaintiff was stopped by a police officer in Boston Heights, Ohio, another municipality, for an unrelated traffic offense. The officer informed plaintiff of

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> any standing vehicle, whether attended or unattended, upon the paved or main traveled street or highway if it is practicable to stop, park or leave such vehicle off the paved or main traveled part of such street or highway. In every event, a clear and unobstructed portion of the street or highway opposite such standing vehicle shall be left for free passage of other vehicles, and a clear view of such stopped vehicle shall be available from a distance of 200 feet in each direction upon such street or highway.
>
> Macedonia Codified Ordinances Title VII, § 351.12.

the Macedonia bench warrant, handcuffed him, and brought him into custody to the Boston Heights police department, where he was later transported in handcuffs to the police station in Macedonia. Plaintiff was released from custody after posting the $250.00 cash bond. At his arraignment on April 3, 1995, plaintiff pleaded not guilty to the traffic and

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Officer Nicholl later filed an affidavit in this case in which he conceded that he referred to the wrong ordinance on plaintiff's parking ticket and that another section of the code should have been cited. Officer Nicholl contends that there were "no parking" signs posted where the vehicle was parked and that plaintiff had parked on the roadway in the right turn lane, both of which are prohibited by ordinance. Plaintiff, on the other hand, maintains that there were no "no parking" signs posted where he parked his car on December 4, 1994. (Brief of Plaintiff-Appellant at 9).

contempt charges against him and his case was set for trial. Plaintiff was tried in Mayor's Court on April 17, 1995. At trial, Mayor Migliorini found plaintiff guilty of both a misdemeanor parking violation, for which he fined plaintiff $50, and the criminal contempt charge, for which he fined plaintiff $100.

Plaintiff appealed his convictions to the Cuyahoga Falls Municipal Court, which dismissed both charges against him on June 20, 1995.[2]

II. PROCEDURAL BACKGROUND

Based on the aforementioned facts, plaintiff filed this action under 42 U.S. C. § 1983 in the United States District Court for the Northern District of Ohio against the City of Macedonia, and against Mayor Migliorini and Officer Nicholl in their official and individual capacities. Count I of plaintiff's complaint essentially alleges that adjudication and sentencing by Mayor Migliorini in the contested traffic and criminal contempt proceedings deprived plaintiff of due process. Count II contends that, on its face, the Ohio statute authorizing mayor's courts is an

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[2] The process of appealing from the decision of a mayor's court is governed by state statute. The relevant provision states that "[a]ppeals from a mayor's court may be taken to the municipal court or county court having jurisdiction within the municipal corporation." Ohio Rev. Code § 1905.22 (1970). Appeals from a mayor's court to the municipal court or county court proceed as a trial *de novo*. Ohio Rev. Code § 1905.25 (1970).

unconstitutional violation of due process because it permits adjudication and sentencing by a Mayor whose executive responsibilities encompass revenue production and law enforcement. Count III alleges that Mayor Migliorini's issuance of a bench warrant for his arrest violated plaintiff's rights under the Fourth and Fourteenth Amendments because the Mayor was not "neutral and detached" from law enforcement. Count IV of plaintiff's complaint claims violation of his procedural due process rights because the traffic citation issued by Officer Nicholl did not inform him how he might contest the complaint. Count V of the complaint alleges violation of plaintiff's right to be free from unreasonable seizure under the Fourth Amendment because Officer Nicholl ticketed him for violating § 351.12 of the Macedonia Codified Ordinances without probable cause. Finally, Count VI set forth a pendent state law claim against Officer Nicholl for malicious prosecution.

Plaintiff filed for summary judgment on Counts I-V of his complaint on January 16, 1997. On June 19, 1997, the district court denied plaintiffs motion as to Counts I and 11, and dismissed Counts 111, IV and V *sua sponte* as insufficient as a matter of law. In September 1995, plaintiff and defendants filed a joint stipulation of facts and each also filed motions for summary judgment on Counts I and 11. On February 17, 1998, the district court denied plaintiff's motion, but granted defendants' motion for summary judgment as to Counts I and 11, dismissed plaintiff's pendent state claim for lack of jurisdiction, and

issued a judgment terminating the case, Plaintiff then filed a timely notice of appeal.

III. DISCUSSION

Plaintiff now appeals the district court's denial of plaintiff's motions for summary judgment on Counts 1, 11, 111, IV and V, its grant of summary judgment for defendants on Counts I and 11, and the district court's *sua sponte* dismissal of Counts 111, IV, V and VI of his complaint. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 326 (1986)(district courts possess power to enter summary judgments *sua sponte, so* long as losing party on notice that she had to come forward with all of her evidence). This court reviews a district court's grant or denial of summary judgment *de novo. Smith v. Ameritech,* 129 F. 3d 857, 863 (6th Cir. 1997). Summary judgment is appropriate when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the non-moving party. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Entry of summary judgment is proper "against a party who falls to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. at 3 22. We also review *de novo* the district court's dismissal for failure to state a claim upon which relief can

be granted. *Cline v. Rogers,* 87 F.3d 176, 179 (6th Cir. 1996). We must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Id.* (citing *In re DeLorean Motor Co.,* 991 F.2d 1236, 1240 (6th Cir. 1993)).

A. Constitutional Challenges to Proceedings in the Macedonia Mayor's Court

Plaintiff contends first that the district court erred in denying his own but granting the defendants' motion for summary judgment on the first two counts of his complaint. In these counts, plaintiff submits that the Ohio statute authorizing mayor's courts on its face violates due process, and that his adjudication and sentencing before Mayor Migliorini in particular was an unconstitutional deprivation of due process because Mayor Migliorini, as a law enforcement officer and chief executive responsible for the financial condition of the municipality, was not "neutral and detached." Plaintiff also appeals dismissal of the third count of his complaint, which challenged Mayor Migliorini's issuance of a bench warrant for plaintiff's arrest for failure to appear in Mayor's Court. We address each of these issues in turn.

i. Facial Challenge to Section 1905. 01

Plaintiff asks us to strike down the Ohio statute authorizing mayor's courts as unconstitutional on grounds it deprives plaintiff of a substantive right under the Due

Process Clause of the Fourteenth Amendment to have a disinterested and impartial judge adjudicate and sentence in any criminal case in which he is a defendant. Amended Complaint, Count 11, at 17, J.A. 47-48.

Section 1905.01 of the Ohio Revised Code authorizes mayors to preside over prosecutions for violations of a municipal ordinance and for certain parking and moving traffic violations "[i]n all municipal corporations not being the site of a municipal court" nor a place where a judge of the Auglaize, Crawford, Jackson, Miami, Portage or Wayne county municipal courts sits. *See* Ohio Rev. Code § 1905.01 (A)-(C). In lieu of personally sitting in judgment, mayors are also authorized by statute to appoint a magistrate to preside over any prosecutions that may be tried in mayor's court. Ohio Rev. Code § 1905.05. The magistrate is vested with the same power as the mayor to decide prosecutions, enter judgment and impose sentences; the judgment and sentence need not be reviewed or approved by the appointing mayor "and have the same force and effect as if they had been entered or imposed by the mayor." Ohio Rev. Code § 1905.05 (A). At the time of plaintiff's prosecution, cases in the Macedonia Mayor's Court we're presided over by either Mayor Migliorini or an appointed magistrate. Mayor Migliorini himself presided over plaintiff's trial.

The constitutionality of mayor's courts is an issue familiar to our Circuit and our analysis of the questions raised in this case is not without guidance. Through the

twentieth century, persistent constitutional challenges to the Ohio mayor's courts have found their way to the Supreme Court of the United States. *See e.g., Tumey v.* Ohio, 273 U. S. 510 (1927), *Dugan v. Ohio,* 277 U. S. 61 (1928), *Ward v. Village of Monroeville,* 409 U.S. 57 (1972). Though presented with the opportunity to do so, the Supreme Court has declined to strike down the mayor's courts altogether. In *Tumey v. Ohio,* Chief Justice Taft observed that "[i]t is ... so common to vest the mayor of villages with inferior judicial functions that the mere union of the executive power and the judicial power in him cannot be said to violate due process of law." *Tumey,* 273 U.S. at 534. In *Dugan v. Ohio,* the Supreme Court upheld a criminal conviction in a mayor's court where the mayor exercised primarily judicial functions and the city manager, not the mayor, was the acting chief executive of the municipality. *Dugan,* 277 U.S. at 63. As the Supreme Court has found no fatal defect in the overarching system that permits a mayor simultaneously to exercise some combination of executive and judicial functions, we affirm the district court's grant of summary judgment for the defendants and its denial of summary judgment for the plaintiff to the extent plaintiff has challenged the facial validity of Section 1905.01 of the Ohio Revised Code.

ii. Adjudication and Sentencing by Mayor Migliorini

Although the State of Ohio is free to authorize mayor's courts in theory, the structure of the courts in practice must be such that the particular combination of executive powers

vested in the mayor does not impair his ability to serve also as a neutral arbiter. Plaintiff contends that he was deprived of due process when Mayor Migliorini presided over his contested case because the breadth of his executive powers preclude his ability to act as a neutral arbiter. *See* Amended Complaint, Count 1, at 16-17, J.A. 46-47. The test for whether the union of executive and judicial power violates due process is whether "the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused..." *Ward v. Village of Monroeville,* 409 U.S. 57, 60 (1972) (quoting *Tumey,* 273 U.S. at 532*)*.

Accordingly, the Supreme Court has held that the Fourteenth Amendment right to due process is certainly compromised where the decisionmaker has a "direct, personal, substantial pecuniary interest" in the proceedings. *Tumey,* 273 U.S. at 523. In *Tumey v. Ohio*, the Supreme Court held that the mayor's court for the Village of North College Hill, Ohio deprived the defendant of due process in a prosecution under Ohio's prohibition statute where, between May 11, 1923 and December 31, 1923, the mayor received $696.35 from liquor-related cases as fees and costs in addition to his regular salary. *Tumey, 273* U.S. at *521-22.* The mayor was neither neutral nor detached because he had a "direct personal pecuniary interest in convicting the defendant who came before him for trial, in

the amount of $12 of costs imposed in his behalf, which he would not have received if the defendant had been acquitted." *Id.* at 523. In contrast, the following year, the Supreme Court upheld a conviction in the mayor's court for the City of Xenia, Ohio where the mayor's vulnerability to bias was diluted. See *Dugan v. Ohio*, 277 U.S. 61 (1928). The mayor was not disqualified as a judge because, unlike the mayor in *Tumey*, he was not the chief executive, but one of five members of the city commission. Instead, the city manager was the active executive. *Id.* at 63. Also unlike *Tumey*, the mayor's salary was fixed by the city commission and he received no fees for cases tried in mayor's court. *Id.* at 62-63. *See also State ex. rel. Brockman v. Proctor*, 35 Ohio St.2d 79, 298 N.E.2d 532, syllabus ¶ 3 (1973) (in municipality where mayor has judicial functions in addition to legislative powers and duties, but city manager has all executive power and administrative responsibility, mayor's relation to finances and financial policy of municipality is too remote to warrant presumption of bias toward convictions in prosecutions before him as judge).

Although the direct personal pecuniary interest of a mayor in the result of his judgment is arguably one of the most flagrant forms of bias, it is not the only reason for holding that due process is denied. *Tumey*, 273U.S. at 532. The Supreme Court recognized in *Tumey* that the mayor's interest in and his responsibility for the financial condition of the village gave him a strong "official motive to convict

and graduate the fine to help the financial needs of the village." *Id.* at 535. The Court elaborated upon this formulation of the "possible temptation" test in *Ward V. Village of Monroeville.* 409 U.S. 57 (1972). In *Ward*, the mayor of Monroeville enjoyed broad executive powers and was the chief conservator of the peace. Under the Monroeville Charter, the mayor was president of the village council, presided at council meetings, voted on the council in case of a tie, accounted annually to the council regarding village finances, filled vacancies in village offices and had general supervision of village affairs. *Ward*, 409 U.S. at 58. In addition a "major part" of the village income, 35 to 50 percent of the village's general revenues, came from fines, forfeitures, costs, and fees imposed by the mayor in the mayor's court.[3] The Court held that the defendant, who was convicted of two traffic offenses in the mayor's court, was deprived of a neutral and detached magistrate, and therefore due process, because "possible temptation" may exist not only when the mayor has direct personal

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[3] The Court described the mayor's court's contributions to the village's coffers over five years as follows:

[I]n 1964 this income contributed $23,589,50 of total village revenues of $46,355.38; in 1965 it was $18,508.95 of $46,752.60; in 1966 it was $16,085 of $43,585.13; in 1967 it was $20,060.65 of $53,931.43; and in 1968 it was $23,439.42 of $52,995.95. This revenue was of such importance to the village that when legislation threatened its loss, the village retained a management consultant for advice upon the problem. *Ward*, 409 U.S. at 58 (footnote omitted).

pecuniary interest but also when "the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Ward, 409* U.S. at 60. The degree of executive authority wielded by the mayor was a significant factor in the inquiry and wholly distinguished the case from *Dugan,* in which the mayor "had judicial functions but only very limited executive authority." *Id.* In comparison, the *Ward* mayor's broad executive powers and the significance of the mayor's court revenues to the fiscal health of the village, for which he was responsible, made his position inherently partisan.

In a recent decision addressing the constitutionality of convictions in the mayor's court in the Village of Peninsula, Ohio, the United States District Court for the Northern District of Ohio attempted to sort out seemingly conflicting standards employed by the Supreme Court of Ohio. *See Rose v. Village of Peninsula,* 875 F.Supp. 442 (N.D. Ohio 1995). At issue was whether, after the United States Supreme Court's decision in *Ward,* the "substantiality" of mayor's court revenues as a percentage of overall revenues was determinative.[4] The court held that while ...

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[4] The *Rose* court explained the apparent inconsistencies in the decisions of the Ohio Supreme Court as follows:

> In *State ex rel. Brockman v. Proctor,* 35 Ohio St.2d 79, 64 O.O.2d 50, 298 N.E.2d 532 (1973), the court completely ignored substantiality as a measure of the constitutionality of the mayor's court, simply holding that "[t]he trial of a defendant charged with, a traffic

substantiality is clearly an important factor in the analysis, the thrust of the inquiry is whether the mayor "occupies two practically and seriously inconsistent positions, one

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> offense by a mayor acting as judge, who is also chief executive and administrative officer of the municipality, and who as such officer is responsible for the financial condition of the municipality, violates due process of law." *Id.* at syllabus ¶2. In *Covington v. Lyle,* 69 Ohio St.2d 659, 23 O.O.3d 535,433 N.E.2d 597 (1982), however, the Ohio Supreme Court accepted the trial, court's having taken judicial notice that "revenue from the Mayor's court does not constitute a substantial portion of the revenue of the Village of Covington," and concluded that the system in place in that village survived constitutional attack under *Ward.*

Rose, 875 F.Supp. at 45 1, n.6. Justice Holmes, joined by Chief Justice Celebrezze, dissented in *Covington.* Justice Holmes concluded that the majority strayed from its position in *Brockman* and incorrectly focused upon substantiality of funds generated by the mayor's court. "Rather, it was the relationship between the mayor as judge and as chief executive and administrative officer of the municipality which was the key factor." *Covington,* 69 0hio St. 2d at 666, 433 N.E.2d at 601-02. Justice Holmes would have held that the requirements of due process preclude the mayor of a village with the, statutory form of government, like the Village of Covington, Ohio, from trying contested cases altogether. *See id.* Tile Northern District of Ohio agreed in *Rose* "that the dissenters in *Covington* have the, more correct interpretation of *Ward.*" *Rose,* 875 F.Supp. at 451 n.6 (quoting *Rose v. Village of Peninsula,* 839 F.Supp. 5 17, 521 (N.D. Ohio 1993)).

partisan and the other judicial." *Ward*, 409 U.S. at 60, 93 S.Ct. at 83 (quoting *Tumey*, 273 U.S. at 534, 47 S.Ct. at 445). The court's assessment of substantiality is merely a step in its determination of whether the degree of separation of the executive and judicial powers vested in mayor-judges adequately safeguards, on average, those judges' impartiality.

> The amount of mayor's court fee revenues is just one measure of whether the mayor may reasonably be questioned as being impartial. The more substantial the amount (or percentage) of revenue produced from a mayor's court, the more reasonable it is to question the impartiality of a mayor who has any executive authority. In similar fashion, the more executive authority vested in the mayor, the more reasonable it is to question the impartiality of a mayor who collected even a relatively minor amount of general revenue through a mayor's court. Thus, inadequate separation of powers in a mayor judge may occur despite the mayor's court's collection of a fairly small percentage of general fund revenue.

Rose, 875 F.Supp. at 452. Therefore the court held although substantiality of revenues is an important factor to consider, it is not a determinative factor and the absence of evidence of substantiality does not necessitate a finding of

impartiality. *See id* (discussing hypothetical mayor's court that collects only one $7 fine in one year and concluding "[t]he relative insubstantiality of the $7 fine" compared to an annual general fund of $700,000 "does not conclusively establish the mayor's impartiality.").

In *Rose,* fines from the mayor's court ranged from 11.8 to 13.9 percent of the general fund annually over a period of three years. In addition, the mayor shared the same level of executive power as the mayor in *Ward*, his powers were governed by the same statutes,[5] and those powers were not diluted as they were in *Dugan. Rose,* 875 F.Supp. at 450. The court concluded that both the "substantiality" of the mayor's courts revenues, which comprised over 10 percent of the general fund, and the "combination and level" of the mayor's executive powers demonstrated the mayor's partiality:

> In this case, the level of executive authority vested in Mayor Ruoff is broad, so that it becomes reasonable to question [his] impartiality even if he collects a fairly small amount of general fund revenue through the mayor's court. Furthermore, the amount of general fund revenue produced form Mayor, Ruoff's court is, though not enormous, substantial. These undisputed facts compel

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[5] These statutes included Ohio Rev. Code §§ 733.23, 733.24, 733.30-35,733.41,737.15 and737.16 governing the executive power in villages.

> the Court to conclude that Mayor Ruoff "occupies two practically and seriously inconsistent positions . . . which] necessarily involves a lack of due process of law n the trial[s] ... before him." *Tumey, 273* U.S. at *534, 47* S.Ct. at *445.* Defendant Rose "[might] with reason say that he feared he could not get a fair trial or a fair sentence." *Id.* at 533, 47 S.Ct. at 445.

Rose, 875 F.Supp. at 453. Though we are not bound by the *Rose* court's opinion, we find it an articulate and persuasive synthesis of the mayor's court decisions.

Thus, in the instant case, while' the percentage of Macedonia's general fund generated from Mayor's Court revenues is relevant to our inquiry, we must also assess the potential impact of the breadth of executive authority vested in the Mayor of Macedonia. Focusing on the court's observation in *Rose* that "[c]ertainly, any person suddenly deprived of 10% or more of his income would find the loss 'substantial,'" *Rose,* 875 F. Supp. at 451, plaintiff urges us to consider that nine percent of Macedonia's general fund was derived from Mayor's Court fines in 1990. Approximately four percent of the general fund was derived from Mayor's Court fines in each year from 1994 to 1996, the time period most contemporary to plaintiff's arrest. The defendants would instead have us rely upon the net revenues generated by the Mayor's Court after deducting costs of operation. These apparently amounted to

approximately two percent of the general fund. We see no need to split hairs over what is a substantial" figure, however, if the mayor's executive authority and administrative responsibilities preclude him from serving as a neutral and detached decision maker. The question for this court therefore becomes whether the level of executive authority vested in the Mayor of Macedonia is broad "so that it becomes reasonable to question [his] impartiality even if he collects a fairly small amount of general fund revenue through the mayor's court." *Rose*, 875 F.Supp. at 453.

Plaintiff contends that the powers vested in the Mayor of Macedonia by charter preclude him from also presiding over the Mayor's Court. Like the mayors in *Ward* and *Rose*, the Mayor of Macedonia is *vested* with broad executive powers. Under the Charter of the Municipality of Macedonia, Ohio ("Charter"), the Mayor is the "chief conservator of the peace" and shall "cause all laws to be enforced." Charter § 3.03 (a). He exercises control over all departments and divisions of the municipality except the City Council. He presides over all Council meetings. He does not participate in deliberations, but votes in the event of a tie. He has the right to recommend and introduce legislation to the Council, and has veto power over ordinances and resolutions adopted by the Council, subject to override by a vote of at least two-thirds of the Council members. Charter § 3.03 (b). He must prepare an annual budget and submit it to the Council, and has "the power to

appoint, promote, discipline, transfer, reduce, or remove any official or employee, except those elected under the Charter and except employees of the Council." Charter § 3.03 (a). The Mayor appoints Department Heads subject to confirmation of a majority vote of those members elected to Council, or votes to disaffirm the appointment by two-thirds of the Council members. The appointment is automatically confirmed in the event of the Council's failure to either confirm or disaffirm within 30 days. Id. The Mayor also appoints civil servants through the Municipal Civil Service Commission ("Commissions). For example, police officers, who are "classified" employees under the Commission's regulations, must submit to examinations administered by the Commission, character and fitness evaluations, and must fulfill other qualifications before the Commission will recommend them for appointment. The Commission certifies three eligible applicants for each job opening and the Mayor may appoint from this list. The Mayor may bypass the Commission and make direct, temporary appointments in the event of an emergency. *See* Rules and Regulations of the Civil Service Commission of the City of Macedonia, Rules IV-VI (1991). Finally, the Mayor of Macedonia must supervise the administration of municipal affairs, perform "other duties, as required by the Charter, the Council, and the laws of the State of Ohio," and has "all, other executive powers provided for mayors of municipalities in the Ohio Revised Code. Charter § 3.03 (a). While the Charter clearly permits

the mayor to delegate certain executive responsibilities for more efficient administration, he ultimately holds a degree of executive power comparable to the mayors in *Ward* and *Rose,* both of whose mayor's courts were found unconstitutional.

Defendants on the other hand urge us to focus, as the district court did, not upon the powers with which the mayor is vested, but upon those that Mayor Migliorini personally exercises and whether he was actually biased in presiding over plaintiff's case. The district court distinguished *Rose* from this case because *Rose* "was premised upon the notion that the mayor' appoints the chief of police and police officers,"' while the district court concluded that there was no evidence to suggest Mayor Migliorini personally selected either Macedonia's Chief of Police or Officer Nicholl, even though the Macedonia Charter ostensibly gives the Mayor the power to do so. Mem. Op. and Order of June 19, 1997, at 10-11, J.A. 142-43. The district court also rejected plaintiff's contention that Migliorini might be biased in favor Officer Nicholl because the Mayor "appointed" him. As the evidence only showed that the mayor appointed Officer Nicholl "as a purely formal act in the discharge of the mayor's executive responsibility to appoint police officers under the municipality's civil service rules," and not that he "had any history with" or in any way "handpicked" Officer Nicholl, there was insufficient evidence to conclude as a matter of law that Mayor Migliorini possessed "a possible

temptation to be partial to the word of Nicholl over [plaintiff] within the meaning of *Ward*." Mem. Op. and Order of Feb. 17, 1998, at 13, J.A. 262. The district court declined to hold the Mayor's Court unconstitutional based only upon the powers vested in the mayor under the Charter without regard to proof of actual bias:

> A finding that Mayor Migliorini possesses a possible temptation to be partial to Nicholl on the evidence presented in this case would indicate that no contested traffic case could constitutionally be tried in mayor's court where the mayor had exclusive responsibility for the ticketing police officer. This court is reticent to reach such a *per se* rule in light of the dramatically different holding in *Ward*.

Mem. Op. and Order of Feb. 17, 1998, at 14, J.A. 263.

There are several problems with the district court's conclusions. First, the holding in *Ward* is not "dramatically different." Ward held that "possible temptation" may exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. *Ward*, 409 U.S. at 60. Similarly, there may exist a "possible temptation" for a mayor presiding over a contested traffic case to give undue credence to a ticketing police officer for whom the mayor has ultimate appointment responsibility. Second, the district court's attempt to distinguish this case from *Rose* and *Ward*

as those cases were premised on the notion that the mayor "appoints the chief of police and police officers," whereas Mayor Migliorini does not, is unpersuasive. The Mayor of Macedonia exercises discretion in the appointment of police officers, albeit after the job applicants have been recommended by the Civil Service Commission. For each opening, the Commission certifies the three top applicants and the mayor chooses one. The district court's emphasis on the lack of proof of actual bias misconstrues the point of the test we must apply. The Supreme Court's test does not call for proof of actual temptation. The mere *possibility* of temptation to ignore the burden of proof is all that is required. Where, as here, Mayor Migliorini was the chief conservator of the peace, retained ultimate responsibility for law enforcement and preparation of the city's budget, and appointed the officer who issued plaintiff's parking ticket, there existed the possibility that Mayor Migliorini would be tempted to forget the burden of proof and defer to the officer's version of events, even through Mayor Migliorini possessed no "actual" temptation or bias.

The broad reach of Mayor Migliorini's executive powers and his sweeping administrative responsibilities necessarily puts him in "two practically and seriously inconsistent positions, one partisan and the other judicial." *Ward*, 409 U. S. at 60 (quoting *Tumey*, 273 U.S. at 534). That under the Charter he may delegate administrative responsibilities for more efficient administration dilutes neither the power with which he is vested nor his

accountability for law enforcement and the fiscal health of the municipality as its chief executive. Because the plaintiff was deprived due process when Mayor Migliorini tried his contested traffic and criminal contempt charges, we reverse the district court's grant of summary judgment for the defendants and its denial of summary judgment for the plaintiff on Count I of his complaint.[6]

iii. Issuance of Bench Warrant for Plaintiff's Arrest

Plaintiff claims that because Mayor Migliorini was not an Impartial decision maker, plaintiff was also deprived of his right under the Fourth and Fourteenth Amendments against issuance of an arrest warrant by a person who is not neutral and detached from law enforcement. *See* Amended Complaint, Count 111, at 19, J.A. 49. It is well-settled that the signing and issuance of an arrest warrant are to be undertaken only by a "neutral and detached" judicial officer. *Coolidge v. Neiv Hampshire,* 403 U.S. 443, 449 (1971) (state attorney general personally in charge of investigating a widely publicized murder, and who later

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[6] We do not decide in this case whether plaintiff would have been deprived due process had his cast been tried by the Mayor's Court Magistrate instead of Mayor Migliorini himself. It is worth noting, however, that mayor's court magistrates are less vulnerable to potential bias. Mayor's court magistrates are appointed by the mayor, but exercise only judicial functions. *See* Ohio Rev. Code § 1905.05. Moreover, they possess some degree of insulation from the mayor's influence as their decisions are not subject to the appointing mayor's review or approval. *See id.*

acted as chief prosecutor at trial, ought not to have issued a search warrant in the case); *Johnson v. United States,* 333 U.S. 10, 14 (1948)("inferences [of probable cause must] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."); *United States v. Weaver,* 99 F.3d 1372, 1376 (6th Cir. 1996)("the court must ... insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for police.'"). *See also Shadivick v. City of Tampa,* 407 U.S. 345, 350-51 (1972)(municipal court clerks neutral and detached, and therefore able to issue warrants for persons charged with breach of municipal ordinances because removed from prosecutor and police and supervised by municipal court judges); *United States v. Boivers,* 828 F.2d 1169, 174-75 (6th Cir. 1987) (district court judge's judicial supervision of city water and sewerage department pursuant to federal court order did not render him incapable of acting as a "neutral and detached" judicial officer in reviewing wiretap application pertaining to criminal investigation of water and sewerage department).

Defendants' contention that the Mayor could validly issue a bench warrant for plaintiffs arrest because the Mayor is only a law enforcement officer when acting in that capacity, and that there is no evidence Mayor Migliorini acted in his capacity as "chief conservator of the peace" when presiding over Mayor's Court, simply cannot

be reconciled with our holding in Part A, *supra,* that a deprivation of due process occurred when Mayor Migliorini presided over plaintiff's trial. In evaluating plaintiff's challenge to issuance of the bench warrant, the district court distinguished the process of making credibility determinations in a trial on a substantive offense from the process of determining whether a party is in contempt: "[t]here does not appear to be any reason to suggest that the mayor could not be 'neutral and detached' in determining whether [plaintiff] failed to appear" in court. Mem. Op. and Order of June 19, 1997, at 13, J. A. 14 5 (citing *United States v. Evans*, 574 F.2d 352, 355 (6th Cir. 1978)). We have held today, however, that the deprivation of due process occurred because the powers with which he was vested necessarily put him in "two practically and seriously inconsistent positions." By virtue of the breadth of his executive powers and administrative responsibilities, Mayor Migliorini lacked authority to preside over the Mayor's Court. Therefore we are also compelled to find that plaintiff was deprived of due process when the Mayor issued a bench warrant for plaintiff's arrest on account of his failure to appear in Mayor's Court. Accordingly, we reverse the district court's dismissal of Count III of plaintiff's complaint.

B. Immunity

Having found that plaintiff suffered a due process violation when Mayor Migliorini issued a bench warrant for his arrest and then presided over his trial for traffic

misdemeanor and contempt charges, we now turn our attention to whether the Mayor and the City enjoy immunity from liability for damages. Plaintiff has filed suit against Mayor Migliorini in his official capacity as "Mayor and Judge of the City of Macedonia's Mayor's Court" and in his individual capacity.

i. Absolute Judicial Immunity

Plaintiff argues that Mayor Migliorini is not protected by absolute judicial immunity because he lacked jurisdiction to try plaintiff's case. Judges are generally absolutely immune from civil suits for money damages, including § 1983 suits. *Mirelles v. Waco*, 502 U.S. 9 (1991); *Pierson v. Ray*, 386 U.S. 547, 553-54(1967); *Barnes v. Winchell*, 105 F.3d 1111, 1115 (6th Cir. 1997). This far-reaching protection "is justified 'by a long-settled understanding that the independent and impartial exercise of judgment vital to the judiciary might be impaired by exposure to potential damages liability. '" *Barnes*, 105 F. 3d at 1115 (quoting *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435 (1993)). Accordingly, absolute judicial immunity is overcome only in two situations. First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. *Mireles*, 502 U.S. at 11-12 (citations omitted); *see also Barnes*, 105 F.3d at 1116 (same).

Whether an action is judicial depends on the "'nature' and 'function' of the act, not the 'act itself.'" *Mireles*, 502 U.S. at 13 (quoting *Stump v. Sparkman*, 435 U.S. 349, 362 (1978)). This functional analysis typically turns on two factors set forth by the Supreme Court in *Stump v. Sparkman*. First, looking to the nature of the act, courts must determine "whether it is a function normally performed by a judge." *Stump*, 435 U.S. at 362. This determination requires the court to "look to the particular act's relation to a general function normally performed by a judge." *Mireles*, 502 U.S. at 13 1 Second, looking to the expectations of the parties, courts must assess whether the parties dealt with the judge in his or her judicial capacity. *Ireland v. Tunis*, 113 F.3d 143 5, 1441 (6th Cir.), cert. denied, 118 S.Ct. 560 (1997) (citing *Stump*, 435 U.S. at 362).

Mayor Migliorini's presiding over the traffic citation and contempt hearing and his issuance of a bench warrant for plaintiff's arrest were certainly judicial acts under this two-pronged inquiry. Rulings on violations of municipal ordinances, including parking ordinances, is a function normally performed by the judge of a mayor's court. *See Hogan v. Lebanon*, 73 Ohio App.3d 230, 237, 596 N.E.2d 1092, 1096 (1991). Plaintiff dealt with Mayor Migliorini in his judicial capacity presiding over the traffic misdemeanor trial. The act of citing and incarcerating a party for contempt of court where the court has subject matter jurisdiction over the charge is also a judicial act to

which absolute judicial immunity attaches. Compare *King v. Love*, 766 F.2d 962, 968 (6th Cir. 1985) (judge absolutely immune from suit for damages stemming from incident in which he jailed motorist charged with driving while intoxicated for contempt, although action exceeded judge's authority, since court had subject matter jurisdiction over charge and incarcerating defendant for contempt was judicial act), with *Harper v. Merckle*, 63 8 F. 2d 848, 859 (5th Cir. 1981) (holding plaintiff in contempt and incarcerating him were not judicial acts where controversy that led to incarceration did not center around any matter pending before the judge, but around domestic problems of plaintiff's former wife who worked at the courthouse). It is well-settled in this Circuit that the issuance of an arrest warrant is a judicial act for judicial immunity purposes. *See, e.g., Ireland v. Tunis*, 113 F.3d at 1441-42; *Foster v. Walsh*, 864 F.2d 416, 417-18 (6th Cir. 1988); *cf. Burns v. Reed*, 500 U.S. 478, 492 (1991) (issuance of a search warrant is unquestionably a judicial act). Thus, Mayor Migliorini enjoys absolute immunity from liability for damages arising both from the due process violation that occurred when he tried plaintiff for the substantive offenses charged, and the due process violation arising out of his issuance of a bench warrant for plaintiff's arrest.

Plaintiff also contends that, on jurisdictional grounds, Mayor Migliorini cannot enjoy absolute immunity from liability under § 1983. Plaintiff claims he had the right to a jury trial under state law because he faced a combined

potential penalty exceeding $100.[7] He neither waived this right not did the Mayor certify the else to a competent court of record as required by state statute.[8] According to plaintiff, the Mayor therefore acted in the absence of jurisdiction to try his contested case. *See Schorle v. City of Greenhills*, 524 F. Supp. 821, 828 (S.D. Ohio 1981)(judge of mayor's court without jurisdiction to hear contempt case when accused refused to waive right to jury trial). With respect to this jurisdictional inquiry, the Supreme Court has instructed that:

> [T]he scope of the judge's jurisdiction must be construed broadly where the issue is the

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[7] Ohio Rev. Code § 2945.17 provides that "[a]t any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of one hundred dollars, the accused has the right to be tried by a jury."

[8] When a defendant enters a plea of not guilty to a misdemeanor charge in a court hot of record, such as a mayor's court,

... if the nature of the offense is such that right to jury trial exists, such matter shall not be tried before [the residing magistrate] unless the accused, by writing subscribed by him, waives a jury and consents to be tried by the magistrate. If the defendant in such event does not waive right to jury trial, then the magistrate shall require the accused to enter into recognizance to appear before a court of record in the county[.]

Ohio Rev. Code § 2937.08. *See also* Ohio Rev. Code § 2938.04 (Failure to waive jury in writing where right to jury trial may be asserted shall the magistrate to certify such case to a court of record as provided on 2937.08 of the Revised Code.").

> immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction."

Stump, 435 U.S. at 356-57 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871)) (footnote omitted). If the matter upon which the judge acts is clearly outside the subject matter jurisdiction of the court over which the judge presides, the act is done in the clear absence of all jurisdiction. *King*, 766 F.2d at 965. "[W]here a court has some subject matter jurisdiction, there is sufficient jurisdiction for immunity purposes." *Barnes*, 105 F.3d at 1122; *Adams v. McIlhaney*, 764 F.2d 294,298 (5th Cir. 1985). By contrast, merely acting in excess of authority does not preclude immunity. See *Sevier v. Turner*, 742 F.2d 262, 271 (6th Cir. 1984). For example, a criminal court judge would be immune from liability for convicting a defendant of a nonexistent crime, an act taken in excess of jurisdiction, whereas a probate court judge would not be immune for trying a criminal case, an act for which the probate judge clearly lacked all subject matter jurisdiction. *Stump*, 435 U. S. at 357, n. 7.

Here, the Mayor's Court had subject matter jurisdiction over traffic tickets where the potential penalty did not exceed $100 and over contempt for failure to appear. Plaintiff was charged with a parking violation

carrying a potential penalty of $50. He also failed to appear for his hearing on February 7, 1995. The Mayor therefore had subject matter jurisdiction over plaintiff's case sufficient to confer absolute immunity from liability. Adjudication and sentencing of plaintiff's case despite the fact that plaintiff never waived his right to a jury trial at most amounts to an act taken in excess of Mayor Migliorini's jurisdiction, not action in the clear absence of all jurisdiction. Thus, Mayor Migliorini is immune from liability for these actions performed in his official capacity.

ii. Qualified Immunity

"Under the doctrine of qualified immunity, government officials acting in their official capacities are protected from being sued in their individual capacities for damages if their actions did not 'violate, clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Greene v. Reeves*, 80 F.3d 1101, 1104 (6th Cir. 1996)(citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). At the time of plaintiff's trial, it was not "clearly established" that Mayor Migliorini would deprive the plaintiff of due process by presiding over the hearing or by issuing a warrant for plaintiff's arrest. The majority of mayor's court cases decided in federal courts prior to the time of plaintiffs trial involved decisionmakers with "direct, personal, substantial pecuniary interest" in the proceedings or mayor's court revenues representing substantial contributions to the general fund. Also, as we have explained in Part A of this opinion, state court

decisions have been far from clear as to whether the focus of the due process inquiry is substantiality of the revenues generated by the mayor's court or the relationship between the mayor as judge and as chief executive and administrative officer of the municipality. *See supra* note 4. Because the law was not clearly established that Mayor Migliorini lacked jurisdiction to try plaintiff's case, he enjoys qualified immunity from liability in his individual capacity.

iii. Liability of the Municipality

As a rule, local governments may not be sued under 42 U.S.C. § 1983 for an injury inflicted solely by employees or agents under a *respondeat superior*- theory of liability. *See Monell v. Department of Soc. Servs.*, 436 U.S. 658, 691 (1978). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. A municipality can therefore be held liable when it unconstitutionally "implements or executes a policy statement, ordinance, regulation, or decision officially adopted by that body's officers." *Id.* at 690, Whether a governmental official is vested with the authority to make official policy is a question of state law. *Jell v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989). The trial judge's task is to "identify those officials or governmental bodies who speak with final policymaking

authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Id.* It is then for the jury to determine whether their decisions have caused a deprivation of rights. *Id.*

Municipalities that meet the requirements of Ohio Rev. Code § 1905.01 are authorized to convene mayor's courts. The statute does not, however, require a municipal corporation or its mayor to establish or maintain a mayor's court. *State ex rel. Boston Heights v. Petsche*, 27 Ohio App.3d 106, 499 N.E.2d 1250, syllabus 2 (1985). In *State ex rel. Boston Heights v. Petsche*, after holding court for almost one year, the Mayor of Boston Heights, Ohio announced his decision to shut down the mayor's court. *Petsche*, 27 Ohio App.3d at 106, 499 N.E.2d at 1250. In response, the village council passed an ordinance requiring the mayor to preside over the mayor's court and to exercise his statutorily conferred jurisdiction. After the Mayor steadfastly refused to hear any cases, the village brought a petition for a writ of mandamus to compel him to abide by the ordinance. The Court of Appeals of Ohio for Summit County denied the writ on grounds the state statute authorizing mayor's courts merely conferred jurisdiction and did not mandate mayor's courts. Also, because the exclusive power to create courts inferior to the Supreme Court of Ohio is vested in the General Assembly, the court concluded that villages "cannot create a mayor's court by

local ordinance" and thereby force their mayors to hold mayor's court. *Id.*, 499 N.E.2d at 125 1.

In this case, the Mayor of Macedonia is undeniably vested with the authority to make official policy regarding whether to hold and how to structure a mayor's court. Jurisdiction to hold mayor's court is conferred upon the Mayor of Macedonia under Ohio Rev. Code § 1905. 0 1. The City's charter confirms that "[t]he Mayor may in *his discretion* hold Mayor's Court, pursuant to the Statutes of the State of Ohio." Charter § 5.01 emphasis added). Thus the mayor speaks with final policymaking authority for the City of Macedonia concerning the functioning of the Mayor's Court. Defendants contend that the City should not be liable for actions of the Mayor "[w]hile acting in his judicial capacity." Brief of Defendants-Appellees, at 20. Although the Mayor acted in his judicial capacity as a trier of fact and interpreter of existing law while presiding over plaintiff's trial, we do not agree that his judicial role encompassed the discretionary decision whether to operate A mayor's court and whether to appoint a magistrate to hear its cases. A mayor's decision whether to hold a mayor's court at all, and if so, whether to preside over it one's self, appoint a magistrate, or perhaps do both, are policy decisions addressing the administration of the municipality. We therefore hold that the City of Macedonia is not immune from liability for plaintiff's deprivation of due process.

C. Failure of City to Provide Adequate Notice

Plaintiff contends that the district court erred in dismissing his claim that he was deprived of procedural due process because the parking citation he received contained no information as to how to contest the complaint, because lie never received any other information, and that even if the City sent a subsequent summons by regular mail, that method of notice was inadequate to provide due process. See Brief of Plaintiff-Appellant at 40-43. The district court dismissed plaintiff's claim on grounds: (1) he articulated no "life, liberty or property" interest affected by Officer Nicholl's mere issuance of the traffic citation to him; and (2) before he was convicted of any offense, plaintiff appeared at trial and, after his conviction, "took advantage of post-deprivation remedies afforded by the state by appealing to (and succeeding in having his convictions dismissed in) Cuyahoga Falls Municipal Court." Mem. Op. and Order of June 19, 1997, at 14-15, J. A. 146-47. Therefore "DePiero received a 'pre[deprivation] opportunity to respond, coupled with post[deprivation] ... procedures,' which were sufficient to satisfy due process." Mem. Op. and Order of June 19, 1997, at 15, J.A. 147 (citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 547-48 (1985)).

In support of his procedural due process claim, plaintiff points to requirements under Ohio law which provide that citations must contain "[a]n order for the offender to appear at a stated time and place," Ohio Rev.

Code § 2935.26 (13)(4), and notice that the offender is required to do one of the following: "[appear at the time and place stated in the citation," §2935.26(B)(6)(a), or within seven days after the date of issuance of the citation,

> (1) Appear in person at the office of the clerk of the court stated in the citation, sign a plea of guilty and a waiver of trial provision that is on the citation, and pay the total amount of the fine and costs;
>
> (2) Sign the guilty plea and waiver of trial provision of the citation, and mail the citation and a check or money order for the total amount of the fine and costs to the office of the clerk of the court stated in the citation. Remittance by mail of the fine and costs to the office of the clerk of the court stated in the citation constitutes a guilty plea and waiver of trial whether or not the guilty plea and waiver of trial provision of the citation are signed by the defendant.
>
> *§ 2935.26(C)(i)-(2).*

The parking ticket left on plaintiffs car contained none of the information required by statute. Plaintiff argues that the failure of the City to include information *in the ticket* about how to contest the citation resulted in deprivation of his liberty, i.e. his arrest for failure to appear. Before a bench warrant was issued for his arrest, however, the City did mail him a summons to his last known address

ordering him to appear in Mayor's Court on January *23, 1995* at *10:30 A.M.* Plaintiff maintains he never actually received this notice and consequently did not appear in court.

Failure of the citation to comply with state law does not, however, automatically translate into a deprivation of procedural due process under the United States Constitution. To satisfy due process under the Constitution, notice must be "(reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," and "must afford a reasonable time for those interested to make their appearance[J" *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 314 (1950). In this case, although the plaintiff did not receive such notice in the ticket itself, nor did he receive it before the first hearing on the citation, he was thereafter mailed a summons on January 12, 1995, ordering him to appear in court on January 23, 1995. The summons also indicated that he would not be threatened with arrest unless he tailed to appear on that date. As a result, he was not deprived of any liberty interest before his failure to appear at the second hearing on January 23, 1995.

Plaintiff claims notice by first class mail was insufficient to satisfy due process. In *Mennonite Bd. of Missions v. Adams,* 462 U.S. 791, 800 (1983), the United States Supreme Court held that "[n]otice by mail or other means as certain to ensure actual notice is a minimum

constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party . . . if its name and address are reasonably ascertainable." In that case, which involved a tax sale of mortgaged property, the Court held that when a "mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service." *Id.* at 798; *see also Weigner v. City of New York,* 852 F.2d 646, 651-52 (2d Cir. 1988) (notices of commencement of tax foreclosure action sent by first class mail pursuant to New York City's Administrative Code satisfied property owner's right to due process when supplemented by publication and posting). In the instant case, plaintiff received a ticket on his car calculated to notify him that traffic charges were pending against him. This was supplemented by notice by mail as to where and when he might it contest the charges. The Fifth Circuit in *Armendariz-Mata v. U.S. Dept. of Justice* held that "[u]nder most circumstances, notice sent by ordinary mail is sufficient to discharge the government's due process obligations;" but when notice is by mail, the proper inquiry is "not simply whether the government sent the notice, but whether it acted reasonably under all the circumstances in relying on the mail as a means to apprise the interested party of the pending action." *Armendariz-Mata v. U.S. Dept. of Justice,* 82 F.3d 679, 683 (5th Cir. 1996). In *Armendariz-Mata,* the Fifth Circuit held that the

government's notice by mail of forfeiture proceedings to a federal prisoner's home and publication in USA Today were insufficient to satisfy due process because he was in jail. "Given the government's knowledge of Mata's whereabouts, the notice to Mata's home residence was not adequate to apprise Mata of the pendency of the forfeiture proceedings." *Id.* In this case, however, plaintiff was not incarcerated and the City had no information about plaintiffs whereabouts that would give reason to suspect he would not actually receive notice mailed to his last known address. *See also United States v. Rodgers*, 108 F.3d 1247,1252-54 (10th Cir. *1997)* (finding when notice mailed to one address was returned undelivered, the government should have tried another address at which it knew that the claimant received mail, stored property, and paid the utility bills). We are not persuaded that the City acted unreasonably in sending notice by first class mail to plaintiffs home.[9]

Therefore we affirm the district court's dismissal of plaintiff's claim that he was deprived of procedural due

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[9] Plaintiff also argues that the City at least should have sent notice by certified mail so that it would be aware via return-receipt whether plaintiff had actually received the mailing. As defendants point out, however, certified mail would not ensure plaintiff's receipt of the notice if, for example, a family member signed for the mailing and then failed to give it to him. *See Weigner*, 852 F.2d at 649 ("the state's obligation to use notice 'reasonably certain to inform those affected' does not mean that all risk of non-receipt must be eliminated").

process because the parking ticket left on his car failed to specify where and how to contest the complaint.

D. Fourth Amendment Claim against Officer Nicholl for Initiating and Filing Citation without Probable Cause

Plaintiff contends that the district court erred in dismissing Count V of his complaint, which alleged a claim under 42 U.S.C. § 1983 for damages against Officer Nicholl and the City for violating his rights under the Fourth Amendment by issuing; a citation under Macedonia Codified Ordinance § 351.12 without probable cause. Under *United States v. Mendenhall,* 446 U.S. 544, 554 (1980), "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." The district court essentially held that, regardless of whether Officer Nicholl had probable cause to ticket plaintiff for a violation of § 351.12, he effected no "seizure" of plaintiffs person upon issuing the traffic ticket because there was no "face-to-face encounter." Plaintiff therefore could not have felt that he was "not free to walk away from Nicholl." Mem. Op. and Order of June 19, 1997, at 16-17, J.A. 148-49.

Plaintiff submits that the district court erred in dismissing his claim because the issuance of a summons alone, without any face-to-face encounter, may constitute a seizure of the person. Plaintiff relies upon Justice

Ginsburg's concurrence in *Albright v. Oliver*, 510 U.S. 2662 277-79 (1994), and the decision of the Sixth Circuit in *Bacon v. Patera*, 772 F.2d 259, 265 (6th Cir. 1985) for the proposition that a Fourth Amendment claim for initiating criminal charges without probable cause may be brought in a case where the police use a summons in lieu of an arrest. Both *Albright and Bacon* are distinguishable from plaintiff's own predicament. Each of the cited cases addressed a situation in which the plaintiff voluntarily responded to a summons or arrest warrant, answered to the charges against him, and was then released on bond in lieu of remaining incarcerated until trial. *See Albright*, 510 U.S. at 268, 279; *Bacon*, 772 F.2d at 262. Plaintiff cannot claim issuance of the traffic ticket effected a "seizure" because upon appearing to answer the charges in the ticket, he would have been afforded a trial. On the date he was issued the parking ticket, he was "free to leave." As a result, plaintiff has no § 1983 claim against Officer Nicholl for issuance of the ticket. It was not until he failed to appear for the hearing on the traffic citation that an arrest warrant or summons sufficient to constitute a "seizure" pursuant to *Bacon v. Patera* or Justice Ginsburg's concurrence in *Albright v. Oliver* would have been, and was in fact, issued. Officer Nicholl had no role in issuance of the bench warrant, so plaintiff cannot maintain a claim under § 1983 against him for such a seizure. Accordingly, we affirm the district court's dismissal of Count V of plaintiff's complaint.

E. Pendent Malicious Prosecution Claim against

Officer Nicholl

Plaintiff appeals the district court's dismissal of his pendent malicious prosecution claim against Officer Nicholl for lack of presence of a viable federal claim. A district court's dismissal of pendent state claims is reviewed for abuse of discretion. *Hankins v. The Gap, Inc.*, 84 F.3d 797, 802 (6th Cir. 1996); *Landefeld v. Marion General Hospital, Inc.*, 994 F. 2d 1178, 1182 (6th Cir. 1993). *See also Ametex Fabrics, Inc. v. Just In Materials, Inc.*, 140 F.3d 101, 105 (2d Cir. 1998) ("[T]he exercise of supplemental jurisdiction is left to the discretion of the district court, and this court's review is limited to whether the district court abused its discretion.") (internal citations omitted).

The supplemental jurisdiction statute, 28 U.S.C. § 1367, confers upon district courts supplemental jurisdiction over all claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367 (a). The statute also permits district courts, in their discretion, to dismiss pendent state law claims if all federal claims have been dismissed. 28 U.S.C. 1361(c)(1).

Plaintiff has failed to show "how any substantial savings in judicial resources would be gained that outweigh the interest in avoiding the unnecessary resolution of state law issues," nor any "undue amount of wasted or duplicative effort that will result from having to re-file ... in

state court." *Hankins*, 84 F.3d at 803. Moreover, plaintiff's request for reinstatement of his malicious prosecution claim is conditioned upon a decision by this court to reverse and remand his constitutional claims to the district court. Brief of Plaintiff-Appellant at 48. As we do not remand any of plaintiff's constitutional claims, we see no utility in sending back to the district court a single issue that turns upon state law and which would be better resolved by the courts of the State of Ohio. Accordingly, we affirm the district court's dismissal of plaintiff's malicious prosecution claim. Because neither the district court nor this court has addressed the malicious prosecution claim on its merits, plaintiff may choose to re-file the claim in state court.[10]

IV. CONCLUSION

Having carefully considered the record on appeal, the briefs of the parties, the arguments of counsel, and the applicable law, we **REVERSE** the district court's grant of summary judgment for the defendants and its denial of

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[10] The statute of limitations for a malicious prosecution claim in Ohio is one year. Ohio Rev. Code § 2305.11(A). The statute of limitations is tolled, however, when a plaintiff files a malicious prosecution claim which ultimately fails otherwise than upon the merits. Ohio Rev. Code § 2305.19 provides that, "[I]n an action commenced, or attempted to be commenced ... or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff ... may commence a new action within one year after such date "

summary judgment for the plaintiff on the first two counts of plaintiff's complaint challenging the constitutionality of Ohio Rev. Code § 1905.01 and alleging that plaintiff was denied due process when Mayor Migliorini presided over adjudication and sentencing of his contested criminal case. We also **REVERSE** the district court's dismissal of Count III of the complaint as we hold that a due process violation occurred upon Mayor Migliorini's issuance of a bench warrant for plaintiff's arrest as a result of his failure to appear in Mayor's Court. We **AFFIRM** the district court's dismissal of plaintiff's remaining claims.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Christopher Depiero,	)	**CASE NO. 5:95 CV 2405**
	)	
Plaintiff	)	**Judge Patricia A. Gaughan**
	)	
vs.	)	**Memorandum of Opinion**
	)	**and Order**
City of Macedonia et al.,	)	
	)	
	)	
Defendants.	)	

U.S. Dist Ct. Filed
6/19/97
Clerk

Before the Court is Plaintiff's Motion for Summary Judgment on Counts I, II, III, IV and V of Plaintiff's Amended Complaint. (Doc. 31.) For the reasons set forth below, the motion is denied.

Statement of Facts

The following facts, except where noted, are not in dispute. On December 4, 1994, plaintiff Christopher DePiero ("DePiero") was issued a traffic citation by Macedonia police officer Glenn Nicholl for violating Macedonia Codified Ordinance §351.12.[11] On February 7,

[11] The Ordinance provides in pertinent part:

Upon any street or highway outside a business or residence district, no person shall stop, park or leave standing any vehicle, whether attended

1995, after plaintiff failed to pay a fine for the violation or appear to contest the ticket in mayor's court, Macedonia Mayor defendant Joseph Migliorini issued a bench warrant for plaintiff's arrest and set bond at $250.00. The warrant was issued by Mayor Migliorini as "Magistrate/Mayor." *(See* Pltf. Mot. at Ex. 2.) As a result of DePiero's failure to appear in mayor's court, a criminal contempt charge was also brought against him.

While being pulled over in another municipality in connection with an unrelated traffic offense on March 6, 1995, DePiero was informed of the Macedonia warrant and was handcuffed and brought into custody in Macedonia. At his arraignment on April 3, 1995, DePiero plead not guilty to the traffic and contempt charges against him and his case was set for trial. DePiero's case was tried in mayor's court on April 17, 1995. Mayor Migliorini found DePiero guilty of both the misdemeanor parking violation and the criminal contempt charge for which he fined DePiero $50 and $100 respectively.

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or unattended, upon the paved or main traveled part of the street or highway if it is practicable to stop, park or so leave such vehicle off the paved or main traveled part of such street or highway. In every event, a clear and unobstructed portion of the street or highway opposite such standing vehicle shall be left for the free passage of other vehicles, and a clear view of such stopped vehicle shall be available from a distance of 200 feet in each direction upon such street or highway.

Macedonia Codified Ordinance §351.12.

DePiero appealed his convictions to the Cuyahoga Falls Municipal Court, which dismissed both charges against him.

Based on. these facts, DePiero filed this action under 42 U.S. C § 1983 against the City of Macedonia, Mayor Migliorini and Officer Nicholl in their official and individual capacities.[12] *(See* Am. Complt.) In Counts I and II, DePiero essentially alleges that the hearing conducted by Mayor Migliorini and. his decision regarding the contested traffic and criminal contempt proceedings violated DePiero's substantive due process rights under the Fourteenth Amendment of the United States Constitution. *(See* Am. Complt. ¶¶ 80-89). In Count III, DePiero alleges that Mayor Migliorini's issuance of a warrant for his arrest violated his rights under the Fourth and Fourteenth Amendments as the Mayor is not "neutral and detached" from law enforcement. *(See id* at ¶¶ 90-95.) DePiero alleges in Count IV that his procedural due process rights under the Fourteenth Amendment were violated as the traffic citation Officer Nicholl issued to him did not apprise him of when and where he could contest the ticket. *(See id.* at ¶¶ 96-99.) In Count V, DePiero alleges that Officer Nicholl ticketed

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[12] DePiero's action was originally brought by DePiero and plaintiff Kenneth P. Barth against the City of Macedonia, Mayor Migliorini, Officer Nicholl, Mary Hegidus and Tammy Ennis. *(See* Am. Compt.) Barth voluntarily dismissed his claims on May 22, 1996. DePiero seeks no relief against Mary Hegidus and Tammy Ennis. Hence, those individuals are no longer defendants in the case.

him for violating Ordinance 351.12 without probable cause, thus violating his Fourth Amendment rights. *(See id.* at ¶¶ 100-103.) In Count VI, DePiero alleges a state law claim against Officer Nicholl for malicious prosecution. *(See id.* at ¶¶ 104-106.)

On January 10, 1997, DePiero filed a motion for leave to file this motion for summary judgment as to counts I, II, III, IV, and V of his complaint. The Court granted the motion on January 16, 1997. None of the defendants filed a timely brief in opposition to DePiero's summary judgment motion. On May 14, 1997, the City and individual defendants Migliorini defendants Nicholl (collectively "defendants") moved for leave to file an opposition brief. The Court granted the unopposed motion by marginal entry order.

In their brief in opposition to DePiero's motion for summary judgment, defendants do not dispute any of the facts sets forth above. However, defendants' version of the facts diverges from DePiero's with respect to the notice DePiero was given of his obligation to appear in mayor's court. DePiero maintains that neither the ticket Officer Nicholl left on his car, nor the court's docket on the day he received the ticket indicated that he was scheduled to appear in court on December 27, 1994. (*See* Pitf. Mot. at 13-14.) Defendants do not dispute that DePiero was scheduled to appear in mayor's court on December 27, 1994, but they assert that Mayor Migliorini did not issue the bench warrant for DePiero's arrest until *after* DePiero

failed to appear in mayor's court on January 23, 1995. Defendants maintain that DePiero was specifically notified of this court date by summons mailed to DePiero's Northfield, Ohio residence. *(See* Def. Br. in Opp. at 9-10, Ex. A.)

Standard of Review

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...

The burden of showing the absence of any genuine issue of material fact rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions of file, together with affidavits, if any," which it believes demonstrates the absence of a genuine issue of
> material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); *see also LaPointe v. UAW, Local 600*,
8 F.3d 376, 378 (6th Cir. 1993).

Furthermore, in reviewing summary judgment motions, the Court must view the evidence in the light most favorable to the non-moving party. *Adickes v. S.H..Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Assn., Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990).

Discussion

Counts I and II

In counts I and II, DePiero contends that he was denied the right to due process of law when Mayor Migliorini heard and decided his contested misdemeanor traffic and criminal contempt cases. (Am. Complt. at ¶¶80-89; Pltf. Mot. at 1-10.) DePiero essentially contends that, as Chief Executive Officer of the city charged with responsibility for overseeing the city's financial affairs and serving as the city's chief conservator of the peace, Mayor Migliorini was not an impartial judge.

The substantive due process implications of Ohio's "mayor's courts" has been the subject of a series of Supreme Court decisions, *i.e.*, *Tumey v. Ohio*, 273 U.S. 510 (1927), *Dugan v. Ohio*, 277 U.S. 61 (1928), and most recently, *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

In *Tumey*, the plaintiff was convicted and fined in mayor's court for possessing liquor in violation of Ohio's Prohibition Act. The Court overturned plaintiff's

conviction on due process grounds. Part of the Mayor's salary was comprised of fees and costs he levied against alleged violators of the Prohibition Act in mayor's court. *See Tumey, 273 U.S.* at 519. Therefore, the Mayor personally stood to gain financially if he convicted defendants before him. The Mayor was also "the chief executive of the village. He supervise[d] all the other executive officers. He [was] charged with the business of looking after the finances of the village." *Id.* at 533. The Court questioned whether "a defendant [might] with reason say that he feared he could not get a fair trial or a fair sentence from one who would have a strong motive to help his village by conviction and heavy fine." *Id.* The Court stated that "[a] situation in which one perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charges with crimes before him", (*id.* at 534), and held that the Mayor was not an impartial judge. (*Id.* at 535.)

The *Tumey* Court declined to hold however, that *anytime* a mayor performs a judicial
function there is a *per se* violation of due process. The Court stated:

> It is, of course, so common to vest the mayor of villages with inferior judicial functions that the mere union of the executive power and the judicial power in him cannot be said to violate due process of

> law. The minor penalties usually attaching to the ordinances of a village council, or to the misdemeanors in which the mayor may pronounce final judgment without a jury, do not involve such addition to the revenue of the village as to justify the fear that the mayor would be influenced in his judicial judgment by that fact.

Id. at 534.

Less than a year after *Tumey*, the Supreme Court decided *Dugan v. Ohio*, 277 U.S. 61 (1928), which likewise involved a challenge to a "mayor's court" conviction under Ohio's prohibition law. The *Dugan* Court held that the plaintiff's conviction in Mayor's Court did not violate due process. The Court reasoned that the mayor in *Dugan* did not have exclusive *Apx. p. 1.38* executive power (but instead was only one of a five member commission that collectively exercised executive power through a city manager), and thus, his connection "to the fund contributed to by his fines as a judge, or to the executive or financial policy of the city, [was] remote." *Id.* at 65. The Court further reasoned that unlike the mayor in *Tumey*, the mayor in Dugan did not "receive[] a salary which [depended] on whether he convict[ed]...." *Id.*

In *Ward v. Village of Monroeville, Ohio*, 409 U.S. 5 7 (1972), the Supreme Court struck down a plaintiffs traffic conviction in Mayor's Court on due process grounds. Although the mayor in *Ward* did not have a direct financial

interest in the outcome of cases tried before him, the mayor had "wide executive powers"[13] and "a substantial portion of village income [was] derived from the fines, forfeitures, costs and fees imposed" in mayor's court. *Id.* at 58. Fines from the village's mayor's court constituted between 44% to 50% of the village's general fund. *See Ward*, 409 U.S. at 58 ("in 1964 [the revenue from mayor's court] contributed $23,589.50 of the total village revenues of $46,355.38; in 1965 it was $18,508.95 of $46,752.60; in 1966 it was $16,085 of $43,585. 13; in 1967 it was $20,060.25 of $53,931.43; and in 1968 it was $23,439.42 of $52,995.95.") On those facts, the Court concluded that "the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id.* at 60. Thus, the Court held that in hearing and deciding plaintiff's traffic case, the mayor "occupie[d] two practically and seriously inconsistent positions, one partisan and the other judicial" in violation of plaintiff's due process rights. *Id.*, *quoting Tumey*, 273 U.S. at 534.

The *Ward* Court clarified that the test for determining the constitutionality of a mayor's court proceeding was not whether the mayor personally shared in

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[13] The mayor was "chief conservator of the peace, . . . president of the village council, preside[d] at all meetings, voted in the case of a tie, account[ed] annually to the council respecting village finances, fill[ed] vacancies in village offices and ha[d] general overall supervision of village affairs." *Ward*, 409 U.S. at 58.

the profits of the mayor's court. Rather, the Court stated: "the test is whether the mayor's situation [as a whole] is one I which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused. . . . '" 409 U.S. at 60.[14]

A court in this district has applied *Ward* to hold that the Mayor of Peninsula's
determination of a plaintiff's contested traffic case violated the plaintiff's due process rights as
a matter of law. *See Rose v. Village of Peninsula,* 875 F. Supp. 442 (N.D. Ohio 1995) (O'Malley, J.) In *Rose,* the plaintiff was convicted in mayor's court for speeding and driving with an expired driver's license. The plaintiff brought a §1983 action against the village and the village's mayor, alleging that he was denied due process of law when the mayor, acting as judge in the mayor's court, decided his contested traffic case.

Judge O'Malley granted plaintiff summary judgment on plaintiff's due process claims. Judge O'Malley ruled that the percentage of Peninsula's general revenue generated from the fines levied in the village's mayor's court (i.e. 10%) was "substantial," so as to "possibly tempt

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[14] Justices Rehnquist and White dissented, stating that the plaintiff's conviction was constitutional since the mayor did not have any "direct financial stake" in the outcome of plaintiff's case. *Id.* at 62.

[the mayor] as a judge to forget the burden of proof" necessary to convict defendants. *Id.* at 45 1. Judge O'Malley further stated that it would be "reasonable to question [a mayor's] impartiality [even if he collects only] a relatively minor amount of the general fund" where the mayor is vested with a very broad level of executive authority. (*Id.* at 452.) This is so, Judge O'Malley reasoned, because it would be "extremely difficult for the average mayor" to remain impartial when evaluating the conduct and credibility of a police officer who issued a contested traffic citation where the mayor "appoints the chief of police and police officers of the village." *(See id.)* (citing the dissenting opinion in the Ohio Supreme Court's decision in *Village of Monroeville v. Ward*, 27 Ohio St.2d 179, 193 (1971)).

To support his contention that Mayor Migliorini was not an impartial judge of his traffic and contempt cases in this case, DePiero relies on the Macedonia Charter, which establishes the Mayor as Macedonia's "chief executive officer," "chief conservator of the peace," and the "head of the [city's] Department of Public Safety" with "the power to appoint, promote, discipline, transfer, reduce or remove any [city] official or employee, except those elected under the Charter and ... employees of Council," and "having all other executive powers provided for mayors of municipalities" in the Ohio Revised Code. *(See* Pltf. Mot. at 7; Ex 1, Charter of the Municipality of Macedonia, art. III, §3.03(a)(l), (4), (11), (12)). *See also*

Ohio Rev. Code §§733.23-24, 733.30, 733.32-35 (describing various aspects of municipal mayors' executive authority, including responsibility to preside over council, to account to the city respecting finances,, to fill vacancies in municipal offices and to have general supervision over city affairs.)

Defendants do not dispute that Mayor Migliorini has broad executive authority, but they contend that this authority is not enough to demonstrate that the Mayor cannot impartially serve as a judge of DePiero's cases because DePiero has not submitted evidence as to "the manner in which the Mayor executes his functions and the interrelationship, if any, between the financial conditions of the city and the Mayor's Court." (Def. Br. in Opp. at 5.) Defendants concede however that fines from Macedonia's Mayor's Court generate revenue for the city, although they point out that the fines comprise only 4% of the City's general revenue. (*See id.* at 3-4.)

Viewing the evidence as the Court must in a light most favorable to the defendants, the Court cannot conclude as a matter of law that the evidence is sufficient to demonstrate that Mayor Migliorini was not an impartial judge of DePiero's traffic and contempt cases. The Court finds this case fundamentally different from *Ward*. In *Ward*, the Supreme Court concluded that the mayor's overall executive responsibility for village finances might make him partisan to convict defendants before him where the fines imposed in mayor's court were the source of

44%-50% of the village's general fund. The Court cannot conclude that Mayor Migliorini possessed a similar temptation to be partisan to convict DePiero here, where fines from Macedonia's Mayor's Court constitute only *4%* of Macedonia's general fund. In short, the Court does not find 4% of Macedonia's general revenue to be "substantial" within the meaning of *Ward*.

Nor does the Court find Judge O'Malley's reasoning in *Rose* as to the partiality of a mayor who possesses a broad level of executive authority but who raises only a relatively small amount of the village's general revenue applicable here. Judge O'Malley's reasoning that a mayor would be partial to the word of ticketing police officer over that of a complaining witness in such circumstances was premised upon the notion that the mayor "appoints the chief of police and police officers." See *Rose*, 875 F. Supp. at 452. There is no evidence in this record to suggest that Mayor Migliorini appointed either Macedonia's chief of police or more importantly Officer Nicholl,[15] even though the Macedonia Charter ostensibly gives the Mayor the *power* to do so. The Court is unwilling to assume that the Mayor was partial to Nicholl's word over DePiero's solely because the Mayor has the power to appoint police officers, where there is no evidence in the record to suggest that

[15] The Court would likely be disinclined to find that the Mayor was somehow partial to Nicholl's word solely on the basis that the Mayor appointed the *chief* of police.

Mayor Migliorini actually appointed, or was somehow otherwise partial to, Nicholl. *Cf. Rose,* 875 F. Supp. at 452, n. 7 (noting that in *Rose,* there was evidence that the Mayor had stated of the ticketing officer: "This is one of my guys. He's a real good officer and I have no reason to doubt him.")

Furthermore, Judge O'Malley's reasoning as to the partiality of appointing mayors does not apply to Mayor Migliorini's hearing and deciding DePiero's criminal contempt case. The contempt proceeding was brought against DePiero as a result of DePiero's failure to appear in court, not as a result of a complaint filed by Officer Nicholl. Thus, there is not even a theoretical basis upon which the Court could conclude that Mayor Migliorini could not impartially decide DePiero's contempt case.[16] Because there is insufficient evidence in this record to conclude that Mayor Miglionni could not have been an impartial judge of DePiero's contested traffic and criminal contempt cases, DePiero's motion for summary judgment with respect to counts I and II is denied.

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[16] DePiero also argues that the Mayor "lacked jurisdiction ... to conduct a trial on the criminal contempt charge" as he contends Ohio Revised Code §§2937.08 and 2945.17 afford him the right to a jury trial. Section 1983 however, pertains only to alleged violations of *federal* constitutional or statutory rights. *See* 42 U.S.C. § 1983. DePiero has not suggested that, or explained how, the alleged infraction of Ohio Revised Code §§2937.08 and 2945.17 amounts to a violation of his constitutional substantive due process rights.

Count III

In Count III, DePiero challenges the constitutionality of Mayor Migliorini's issuance of the bench warrant for his arrest. DePiero contends that as the "head of the [City's] Department of Public Safety" and "chief conservator of the peace," the Mayor is not a "neutral and detached" magistrate, and thus the Mayor's issuance of the warrant for DePiero's arrest violated his Fourth Amendment rights. *(See* Pltf. Mot. at 11-13.) Among other cases, DePiero cites *Shadwick v. Tampa,* 407 U.S. 345, 350 (1972), in which the Supreme Court stated that "whatever else neutrality and detachment might entail [for purposes of issuing warrants], it is clear that they require *severance and detachment from the activities of law enforcement." Id* (emphasis added.) According to DePiero, because of Mayor Migliorini*'s* role as the head of public safety in the city, he, as a matter of law, was not neutral and detached when he issued the bench warrant for DePiero's arrest.

Defendants cite no authority suggesting that a mayor may constitutionally issue warrants. They simply argue that Mayor Migliorini is neutral and detached. *(See* Def. Br. in Opp. at 8-9.)

The Supreme Court has held that arrests warrants must be issued by "neutral and detached" magistrates. *Shadwick*, 407 U.S. at 350. In *Shadwick,* the Court held that a Tampa municipal clerk appointed by the city's clerk of courts with the approval of the mayor was neutral and

detached for the purposes of issuing warrants for the arrest of citizens charged with violating municipal ordinances. The Court reasoned that the clerk worked for a municipal court judge, not "the police or prosecutor." *Id.*

Relying on *Shadwick* and other Supreme Court cases in which individuals were found not to be neutral and detached for purposes of issuing search warrants based upon their close association with law enforcement,[17] DePiero contends that Mayor Migliorini was not neutral and detached in issuing the warrant for DePiero's arrest. While DePiero's reasoning might
have been valid had the Mayor issued the arrest warrant based upon DePiero's violation of the city's parking ordinance, the Mayor issued the warrant based upon DePiero's "failure to appear" in court. *(See* Def Br. in Opp. at 3; Pltf. Mot. at Ex. 2.) There does not appear to be any reason to suggest that the mayor could not be "neutral and detached" in determining whether DePiero failed to appear. *See United States v. Evans*, 574 F.2d 352, 355 (6th Cir. 1978) (acknowledging distinction for the Fourth Amendment purposes between arrest warrants for failure to appear in court and arrest warrants based on violations in traffic complaint.)

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[17] *See e.g., Coolidge v. New Hampshire*, 403 U.S. 443 (197 1) (holding that attorney
general was not neutral and detached for purposes of issuing search warrant).

Therefore, DePiero's motion with respect to count III is denied.

Count IV

In Count IV, DePiero contends that he was deprived of his procedural due process to notice and an opportunity to be heard because the traffic ticket Office Nichoil left on his car did not apprise him of how he could contest the ticket, including when and where to appear in mayor's court. (Pitf. Mot. at 13-14.) As support for this position, DePiero cites the Ohio Court of Appeals decision in *City of Warren v. Granitto,* 93 Ohio App.3d 723), 639 N.E.2d 865 (Trumbull Cty. 1994). In *Granitto,* the Court reversed a plaintiffs traffic convictions on thirty overdue parking tickets where the tickets failed to include information specified in Ohio's Uniform Traffic Ticket, Ohio Criminal Rule of Procedure 4. l(C) and Ohio Rev. Code §2935.26. The Court ruled:

> Appellant contends, and we agree, that the parking tickets issued by [the city] are fatally defective because they lack certain important information. [The tickets do not] contain[] information concerning the address or telephone number of the issuing authority. The tickets also lack information as to when to appear, or, at the very least, where to appear to pay or contest the ticket, and contain no information regarding the procedure to be utilized to contest the ticket

> .... It is arguable whether [Ohio's Uniform Traffic Ticket, Ohio Crim. R. 4.1(C) and Ohio Rev. Code §2935.26] are binding on the instant situation; however, we also recognize that they were designed to protect the basic procedural due process rights, such as the right to a speedy trial . . . Thus, we feel it is appropriate to look to these statutes for guidance as to what basic elements of information should be included in such tickets to preserve appellant's due process rights.

9 Ohio App.3d at 726.

Defendants do not dispute that the ticket left on DePiero's car did not apprise him of when and where he should appear in mayor's court, but argue that DePiero suffered no deprivation of his constitutional due process rights because he was *afforded* notice and an opportunity to be heard in mayor's court in connection with the traffic ticket before the Mayor issued the bench warrant for his arrest. (Def Br. in Opp. at 9.)

Despite the statements of the Ohio Court of Appeals in *Granitto,* federal law is clear that the procedural protections of the Fourteenth Amendment of the Constitution only apply when there is a deprivation of "life, liberty, or property." *Ingraham v. Wright,* 430 U.S. 651, 672(1977), *See also Board of Regents v. Roth,* 408 U.S. 564, 571 (1971). DePiero has articulated no "life, liberty or

property" interest affected by Officer Nicholl's mere issuance of the traffic citation to him. Even accepting the notion that DePiero had a protectible interest in not having a warrant issued for his arrest, the City maintains that it notified DePiero of the opportunity to contest the ticket in mayor's court before the warrant was issued.[18] That DePiero did not appear at that court date does not mean that he was deprived of an opportunity to be heard.

Furthermore, before DePiero was convicted of any offense, he appeared at trial. *See Carter v. Western Reserve Psychiatric Habilitation Center,* 767 F.2d 270 (6th Cir. 1985) (classified civil service employee's pretermination hearing was constitutionally sufficient where employee received notice of charges against him and was afforded opportunity to respond.) After his conviction, DePiero took advantage of postdeprivation remedies afforded by the state by appealing to (and succeeding in having his convictions dismissed in) Cuyahoga Falls Municipal Court. Thus, DePiero received a "pre(deprivation] opportunity to respond, coupled with post[deprivation] ... procedures." *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 547-48 (1985). Such procedures are sufficient to satisfy process. *See id.* Accordingly, DePiero's motion for

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[18] DePiero has no knowledge that the City did not issue this notice but says he never received it and questions the Mayor's ability to attest to the fact that it was issued. *(See* Pltf Rep. Br. at 2.) The Court finds the Mayor competent to attest to information contained in the City's records, including records pertaining to the summons sent to DePiero.

summary judgment on his procedural due process claim is denied.

Count V

In Count V, DePiero claims that Officer Nicholl "seized" him without probable cause in violation of his Fourth and Fourth Amendment rights because Officer Nicholl issued him a traffic citation for violating Macedonia Ordinance 351.12 when in fact, he did not park his car in such a way as to violate that ordinance. (Pltf. Mot. at 15-17.)

Defendants do not dispute that DePiero did not violate Ordinance 351.12, but they maintain that Officer Nicholl had probable cause to charge DePiero with a parking violation because DePiero had violated another parking ordinance of the city, but mistakenly cited DePiero for violating Ordinance 351.12. (Def. Br. in Opp. at 10.) Defendants also dispute that DePiero was "seized" when Officer Nicholl signed and issued the traffic citation. *(See id.* at 9.)

DePiero relies on *Bacon v. Patera,* 772 F.2d 259, 265 (6th Cir.1985), to support the proposition that Officer Nicholl's issuance of the traffic citation constituted a seizure. *(See* Mot. at 15, n.7.) In *Bacon,* a private investigator brought a § 1983 action against Brunswick's Chief of Police alleging that the chief violated his constitutional rights when the chief improperly "cited" the investigator by serving him with summonses for allegedly violating a Brunswick ordinance relating to commissions.

(*Id.* at 262.)[19] Citing *United States v. Mendenhall,* 446 U. S. 544 (1980), and *Terry v. Ohio,* 392 U. S. 1 (1968), the Sixth Circuit held that although the investigator was never arrested, the facts of the case "could support a jury finding that [he] had been seized" within the meaning of the Fourth Amendment. *(See id.* at 265) ("a person is considered seized if he is unable to leave an officer's presence without permission.")

Unlike the facts in *Bacon* however, there was never any face to face encounter between Officer Nicholl and DePiero here. As DePiero himself alleges, Officer Nicholl "did not personally serve" him with the traffic citation. *(See* Am. Complt. at ¶29.) *See also* Pltf. Rep. Br. at 1, n, 1 ("DePiero specifically denies that he had any face to face contact with Defendant
Nicholl. . . .") Instead, DePiero alleges that Nicholl left the citation "somewhere on [DePiero's] vehicle" while it was parked on Sumner Street. (*See id. at* ¶30.) DePiero sets forth no allegations to suggest that he was present when Officer Nicholl issued the ticket, much less allegations that could support an inference that DePiero did not feel free to walk away from Nicholl. *See United States v. Mendenhall,* 446 U.S. at 553-54 ("a person has been seized within the

[19] The chief personally served the investigator with one citation for violating the ordinance. Members of the police chief's staff subsequently personally served the investigator with four additional citations.

meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave . . . "); *United States v. Grant,* 920 F.2d 376, 382 (6th Cir. 1990) (in determining whether a seizure has occurred, "[t]his court's traditional test asks: in light of all of the circumstances, would 'a reasonable person. . . have believed that he or she was not free to walk away'") *(citing United States v. Saperstein,* 723 F.2d 1221, 1225 (6th Cir. 1983)). As such, Officer Nicholl's ticketing of DePiero did not constitute a "seizure" withing the meaning of the Fourth Amendment.[20] Accordingly, DePiero's motion with respect to Count V is denied.

Conclusion

For the foregoing reasons, the Court denies DePiero's motion for summary judgment on Counts I, II, III, IV and V of his complaint. In addition, because the Court concludes that DePiero's claims under Counts III, IV, and V are insufficient as a matter of law, the Court dismisses those counts sua *sponte. See Celotex Corp. v. Catrett,* 477 U.S. 317, 326 (1986) ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgment *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence.")

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[20] Because there is no "seizure," the Court need not address whether Officer Nicholl had probable cause to cite DePiero..

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Christopher DePiero,	**) CASE NO. 5: 95 CV 2405**
	)
Plaintiff,	**) Judge Patricia A. Gaughan**
	)
vs.	**) Memorandum of**
	) Opinion and Order
City of Macedonia et al.,	**)**
	)
	)
Defendants.	**)**

U.S. Dist Ct.
Filed 2/17/98

Before the Court in this Section 1983 action are plaintiff's motion for summary judgment on Counts I and II (doc. 39) and defendants' motion for summary judgment on Counts I, II and VI. (Doc. 44.) For the reasons stated below, the Court denies plaintiff's motion, grants defendants' motion insofar as it seeks judgment on Counts I and II and dismisses Count VI for lack of the presence of a viable federal claim.

Facts and Background

Plaintiff Christopher DePiero was issued a traffic citation on December 4, 1994 by Macedonia police officer Glenn Nicholl for violating Macedonia Codified Ordinance §3 51.12.[21] After DePiero failed to pay a fine for the

[21] The Ordinance provides in pertinent part:

violation or appear to contest the ticket in mayor's court, Macedonia Mayor-defendant Joseph Migliorini issued a bench warrant for DePiero's arrest. A criminal contempt charge was also brought against DePiero as a result of his failure to appear in mayor's court.

While being pulled over in another municipality in connection with an unrelated traffic offense on March 6, 1995, DePiero was informed of the Macedonia warrant for his arrest, handcuffed and brought into custody in Macedonia. He was detained until he posted a $250 bond. At his arraignment on April 3, 1995, DePiero pleaded not guilty to the traffic and contempt charges against him. DePiero's cases were tried in mayor's court on April 17, 1995. Migliorini presided as judge at the trial. Migliorini found DePiero guilty of both the misdemeanor parking

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> Upon any street or highway outside a business or residence district, no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled part of the street or highway if it is practicable to stop, park or so leave such vehicle off the paved or main traveled part of such street or highway. In every event, a clear and unobstructed portion of the street or highway opposite such standing vehicle shall be left for the free passage of other vehicles, and a clear view of such stopped vehicle shall be available from a distance of 200 feet in each direction upon such street or highway.

violation and criminal contempt for which he fined DePiero $50 and $100 respectively. The parties do not dispute that despite Migliorini's decision, DePiero did not violate Ordinance 351.12. Defendants assert, and DePiero does not dispute, however, that DePiero parked his car in violation of another parking ordinance of the city.

DePiero appealed his convictions to the Cuyahoga Falls Municipal Court. Following a motion by the Macedonia prosecutor, Judge William Pike of the Cuyahoga Falls Municipal Court dismissed both charges against DePiero.

DePiero subsequently filed this action under 42 U. S.C § 1983 against the City of Macedonia and Mayor Migliorini and Officer Nicholl in their official and individual capacities. In Counts I and II of his amended complaint, DePiero alleges his substantive due process rights under the Fourteenth Amendment were violated by Mayor Migliorini's hearing and deciding the contested traffic and criminal contempt cases against him. *(See* Am. Complt. ¶¶ 80-89). Count I alleges that DePiero has a fundamental right derived from the liberty component of the Due Process Clause of the Fourteenth Amendment to have his traffic and contempt cases heard in a court of proper jurisdiction. Count II alleges that DePiero has a substantive due process right derived from the Due Process

Clause to have a disinterested and impartial judge adjudicate and sentence in his cases.[22]

In January of 1997, DePiero moved for summary judgment on all of the counts in his complaint. In denying DePiero's motion for summary judgment as to Counts I and II, this Court applied Supreme Court precedent addressing the substantive due process implications of Ohio's mayor's courts, *Tumey v. Ohio,* 273 U.S. 510 (1927); *Dugan v. Ohio,* 277 U.S. 61 (1928); and *Ward* v. *Village of Monroeville,* 409 U. S. 57 (1972). (June 19, 1997 Memorandum of Opinion and Order.) The most recent of those decisions, *Ward,* clarified earlier precedent and stated that the test for determining whether a plaintiff's due process rights are violated when a mayor presides over a contested trial in mayor's court "is whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him

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[22] DePiero also alleged that the Mayor's issuance of the warrant for his arrest violated his rights under the Fourth Amendment because the mayor is not detached from law enforcement (Count III), his procedural due process rights were violated because the traffic citation Officer Nicholl issued to him did not apprise him of when and where he could contest the traffic ticket (Count IV) and Officer Nicholl lacked probable cause to ticket him thus violating his rights under the Fourth Amendment. (Count V.) In addition, DePiero alleged a state law claim against Officer Nicholl for malicious prosecution. *(See id.* at ¶¶ 104--106.) The Court has dismissed all of these claims except the state law malicious prosecution claim.

not to hold the balance nice, clear and true between the State and the accused . . . '" 409 U.S. at 60. The Court held that a mayor's responsibility for village finances might make him partisan to convict defendants appearing before him in mayor's court where revenue produced in that court "provides a substantial portion of the municipality's funds." *Id.* at 59.

This Court reasoned that summary judgment in DePiero's favor on his due process claims was inappropriate under *Ward.* In particular, this Court found this case "fundamentally different" from *Ward* in that the mayor's court in *Ward* generated between 44% and 50% of the village's general fund, whereas the evidence in this case indicated that fines from Macedonia's Mayor's Court constituted only 4% of Macedonia's general fund. This Court did not find 4% of the general revenue to be "substantial" within the meaning of *Ward. (See* Memorandum of Opinion and Order at 10.)

This Court also concluded that there was insufficient evidence to suggest that Mayor Migliorini was partial under the reasoning of Judge O'Malley in *Rose v Village of Peninsula,* 875 F. Supp. 442 (N.D. Ohio 1995). In *Rose*, Judge O'Malley granted summary judgment to a plaintiff convicted of a misdemeanor parking offense in Peninsula's mayor's court. Judge O'Malley found that the mayor had overall responsibility for village finances and that revenues from Peninsula's mayor's court raised over 10% of the village's revenues. Judge O'Malley ruled that

10% was "substantial" within the meaning of *Ward*. *Id.* at 451. Judge O'Malley further stated, however, that substantiality of revenue was not the only factor for determining whether a defendant convicted in a contested case in mayor's court is denied due process of law. *Id.* at 452. Judge O'Malley stated that it would also be "reasonable to question [a mayor's] impartiality [even if he collects only] a relatively minor amount of the general fund" through fines levied in mayor's court where the mayor is vested with a very broad level of executive authority. Judge O'Malley's reasoning was premised upon the notion that the mayor, "as executive officer, appoints the chief of police and police officers...and as a judge he evaluates their conduct as against opposing witnesses." *Rose,* 875 F. Supp. at 452.

This Court found Judge's O'Malley's reasoning as to the partiality of a mayor who collects a relatively minor amount of a village's revenue through fines in mayor's court inapplicable as there was no evidence in the record before this Court that Mayor Migiiorini actually appointed or was somehow otherwise partial to Officer Nicholl. (Mem. of Op. and Ord. at 10-11.) This Court also found that Judge O'Malley's reasoning did not apply to DePiero's criminal contempt case because that case did not involve a situation in which the mayor had to evaluate the credibility of a police officer against the word of a defendant and, therefore, there was no reason to conclude that the mayor's

appointment of Nicholl would indicate that the mayor could not decide the contempt matter impartially. *(Id.)*

DePiero has now filed a second motion for summary judgment as to Counts I and II. (Doc. 39.) Defendants oppose DePiero's motion and move for summary judgment in their favor on Counts I, II and VI (a state law claim for malicious prosecution against Officer Nicholl.) (Doc. 44.)

The parties are in agreement that Mayor Migliorini possesses wide executive powers, he is chief conservator of the peace and head of the department of public safety, he supervises the administration of municipal affairs, he has responsibility for preparing and submitting an annual budget to council and he exercises control over all municipal departments and divisions except council. Charter of the Municipality of Macedonia, Ohio, attached to DePiero's Br. at Ex. 1, Article III In addition, the parties agree that "The Mayor of the City of Macedonia is the appointing authority for all its police officers although his appointments require confirmation of council." Joint Stipulations of Parties, docket 43. The parties further agree, however, that "[t]he Mayor's appointment power of police officers is restricted to choosing among those candidates who have tested with the Civil Service Commission, met with Civil Service requirements and whose names are provided to the Mayor for appointment by such Commission." *Id.* The parties agree that Migliorini

appointed Nicholl in accordance with those procedures for appointing civil servants.

Standard of Review

Federal Rule of Civil Procedure 56(c) governs the parties' pending motions for summary judgment and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

The burden of showing the absence of any genuine issue of material fact rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions of file, together with affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U. S. 317, 3 22-23 (1986); *see also LaPointe v. UAW, Local 600,*

8 F.3d -376, 378 (6th Cir. 1993). The non-moving party then must come forward with evidence showing that there is a genuine issue of fact for trial. *Celotex*, 477 U.S. at _324.

In reviewing summary judgment motions, the Court must view the evidence in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Assn, Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990).

Discussion

I. DePiero's Motion.

DePiero makes essentially four arguments in support of his motion for summary judgment on his due process claims: (1) Mayor Migliorini's presiding over his contested cases is a *per se* violation of due process because Migliorini is vested with responsibility over the police, and law enforcement officers are not "neutral and detached" (DeP. Br. at 5-6); (2) Migliorini is not impartial under *Rose v. City of Peninsula* in that Migliorini admitted that he appointed Officer Nicholl (*Id.* at 7); (3) Migliorini is not impartial under *Ward v. Village of Monroeville* on the basis of DePiero's statement that revenues from Mayor's Court constituted 9.4% of the city's General Revenue Fund in 1990 (*Id.* at 9-10); and (4) Migliorini "lacked jurisdiction pursuant to statutory limitations under the Ohio Revised Code to conduct a trial on the criminal contempt charge filed against Plaintiff DePiero." (*Id.* at 10-11).

A. The Mayor is *per se* not neutral and detached.

To support his contention that Mayor Migliorini's presiding over his cases as judge in Macedonia's mayor's court is a *per se* violation of due process, DePiero solely relies on Fourth Amendment cases establishing that the Fourth Amendment is violated when persons who are not neutral and detached from law enforcement issue warrants. *See* DeP. Br. at 5-6, citing *Johnson v. United States,* 3 3 3 U.S. 10 (1948); *Shadwick v. Tampa*, 407 U.S. 3 45 (1972); *United States v. United States District Court, Eastern District of Michigan* 407 U. S. 297 (1972); *United States v. Leon,* 468 U. S. 897 (1984); *United States v. Weaver,* 99 F.3d 1372 (6th Cir. 1996).

DePiero is correct that "due process requires that a defendant be given a 'neutral and detached judge in the first instance." *Concrete Pipe and Products v. Construction Laborers Pension Trust,* 508 U.S. 602, 618 (1993), quoting *Ward v. Village of Monroeville,* 409 U.S. at 60. However, the test for determining whether a judge is neutral and detached for purposes of due process is not the same test applied under the Fourth Amendment for determining whether an individual is a neutral and detached magistrate for purposes of issuing warrants *(i.e.,* that the person be neutral and detached from law enforcement). The test for determining whether a mayor's presiding over a contested traffic case in mayor's court violates due process is whether the mayor as judge is in a situation "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the

defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused . . . " *Ward*, 409 U.S. 60. DePiero's Fourth Amendment cases do not apply this test Furthermore, DePiero's Fourth Amendment cases do not consider whether a mayor is a neutral and detached magistrate for purposes of issuing a warrant under the Fourth Amendment. Nor do they hold that a mayor is a "law enforcement officer."

For these reasons, the Court rejects DePiero's argument that Mayor Migliorini's presiding over the trial of his traffic and contempt cases is a *per se* violation of his due process rights on the basis of DePiero's Fourth Amendment cases.

B. Application of the test in *Ward*.

As stated, the test for whether Mayor Mighorini's presiding over DePiero's cases violated his due process rights is whether Migliorini was in a situation "which would offer a possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused." *Ward*, 409 U.S. at 60. DePiero makes two arguments relevant to this test. He argues that Mayor Migliorini is not impartial under Judge O'Malley's reasoning in *Rose* because the Mayor appointed Officer Nicholl. (DeP. Br. at 7.) In addition, he argues that Mayor Migliorini had a financial interest in the outcome of DePiero's cases. DePiero states:

> Defendant Migliorini became Mayor of Macedonia in 1988. In 1990, with Defendant Migliorini as the Chief Executive Officer responsible for the financial condition of the municipality and Judge of the Mayor's Court, the City of Macedonia derived income of $209,457.26 from its Mayor's Court in fines and costs out of total general fund revenue of $2,232,258.53). As a result, 9.4% of the general fund revenue was derived from the Mayor's Court.

(DeP. Br. at 9.) DePiero submits that 9.4% is "substantial" within the meaning of *Ward* and is a level of contribution which 'might offer a possible temptation" for Migliorini to forget the burden of proof required to convict DePiero and may make him partisan to maintain the high level of contribution from the mayor's court." (*Id.* at 9-10.)

Defendants do not dispute that Migliorini appointed Nicholl, but defendants point out he did so pursuant to procedures set forth in the Municipal Charter and the Civil Service Rules and Regulations. (Def Br. at 8.) According to defendants:

> Although the Mayor has what is termed "appointment power" over officers within the police department, the first impression given by the term "appointment power" might lead one to believe that the Mayor may select who he wishes to be a police

> officer. However, one must look to the City Charter, Section 8.01 which refers one to the Civil Service Rules and Regulations of the City. Police officers are classified civil servants. The Mayor's appointment powers are restricted to those candidates who have tested with the Civil Service Commission and whose names are provided to the Mayor for approval/appointment.

(*Id.*) Thus, in his responses to DePiero's interrogatories as to who appointed Nicholl, Nfigliorini responded: "Myself as Mayor following recommendation of Police Chief, confirmation of Council and other requirements of Charter and Civil Service Requirements." *(See* DeP. Ex. 2 at 13.)

In addition, although defendants do not dispute DePiero's assertion that fines from mayor's court constituted 9.4% of the city's general revenue in 1990, defendants state:

> Mayor's court for the city of Macedonia generates only a small fraction of total revenues for the city. In fact, in 1995, Mayor's Court revenue totaled $176,244.57 before cost of operation, which is approximately 4% of the general fund of $4,076,565.5 1. Such total includes not only contested cases but uncontested cases and not only those cases which are handled by the mayor but also by the magistrate.

(Def Br. at 4.)

Defendants further assert that after certain operational expenses of mayor's court (such as personnel costs for the prosecutor and clerk) are deducted from the revenues, fines and costs collected in mayor's court constituted only 3.2% of the city's general revenue in 1993, 2. 1 % of the city's revenue in 1994 (the year DePiero was found guilty and fined by Mayor Migliorini) and 2.5% in 1995. *(See* Def. Br. at 4, Ex. C-1.) DePiero has not filed any response to defendants' motion and, therefore, has not disputed defendants' numbers. Defendants support their numbers for 1993, 1994 and 1995 with the affidavit of Tom DiLellio, the Finance Director of the City of Macedonia. *(See* Def. Br. at Ex. C.) DeLellio avers that the chart defendants submit at Ex. C-1 reflects total revenue figures and figures for the revenue derived from mayor's court for 1993, 1994 and 1995. The figures from the chart are the figures from which defendants' calculations were made.

Therefore, even though the parties are in apparent agreement that Macedonia's mayor's court generated 9.4% of the city's general revenue in 1990, defendants' numbers (which DePiero does not contest) suggest that in more recent years, including the year the Mayor presided over DePiero's cases, mayor's court raised only insubstantial amounts of the city's general revenue after operating expenses were deducted, i.e., 3.2% of the city's general revenue in 1993, 2. 1% in 1994 and 2.5% in 1995. These figures do not suggest that Macedonia's mayor's court

provides "a substantial portion of [the] municipality's funds." *Ward*, 409 U.S. at 270.

This, then, leaves only the undisputed fact that Mayor Migliorini appointed Officer Nicholl pursuant to Macedonia's Civil Service Rules and Regulations. Judge O'Malley stated in *Rose* that due process is violated where a mayor collects only a small percentage of the city's revenue through fines collected in mayor's court "where the mayor, as executive officer appoints the chief of police and police officers of the village." *Rose,* 875 F. Supp. at 452. Her reasoning relies in part on a dissenting opinion in the Ohio Supreme Court's decision in *Ward.*

Although this Court agrees with Judge O'Malley that the Supreme Court in *Ward* did not limit the circumstances under which a mayor's court proceeding may violate a defendant's due process rights to situations where mayor's court generated a "substantial portion" of the village's revenue (and, therefore, the Court agrees that the Supreme Court did not indicate that substantiality of revenue is necessarily a dispositive inquiry in the due process analysis), this Court does not read *Ward* to stand for the proposition that a mayor is not impartial under the test set forth in *Ward* solely on the basis of the mayor's executive responsibility to appoint police. As indicated above, *Ward* held only that a mayor cannot be a fair and impartial judge of a contested trial in mayor's court where mayor's court generates a "substantial portion" of village revenue. *See Ward*, 409 U.S. 59 ("Conceding that 'the

revenue produced from a mayor's court provides a substantial portion of a municipality's funds,' the Supreme Court of Ohio held nonetheless that 'such fact does not mean that a mayor's impartiality is so diminished thereby that he cannot act in a disinterested fashion in a judicial capacity'. . . . We disagree.") *Ward* simply did not address the question of whether and under what circumstances a mayor is impartial by virtue of his executive responsibility to appoint police. No case that has been brought to this Court's attention holds that a defendant's due process rights are violated in a contested mayor's court proceeding solely because the mayor has executive responsibility for appointing police officers. (Indeed, even Judge O'Malley did not hold that due process was violated solely because a mayor appoints police officers since she also held in *Rose* that Peninsula's mayor's court generated a substantial portion of the village's income.).

This Court can envision situations in which a mayor may be said to possess a "possible temptation" to be partial to the word of a ticketing police officer over the word of a defendant in a contested traffic case.[23] However, this Court does not conclude that such is the case solely because the mayor is vested with executive responsibility for

[23] For example, this Court would be inclined to conclude that a mayor is partial to the word of a ticketing police officer based upon testimony similar to the testimony in *Rose* that the mayor considered the ticketing officer "one of [his] guys" and that he had "no reason to doubt" him.

appointing police in the municipality. While Migliorini appointed Nicholl, the evidence the parties have submitted suggests that Migliorini did so only as a formality in accordance with applicable rules governing the appointment of civil servants. There is no evidence that Migliorini even knew Nicholl (before or after his appointment) or otherwise exercised his discretion or judgment in selecting Nicholl to become a police officer over other candidates. There is no evidence that Migliorini had any history with Nicholl, handpicked Nicholl for the police force or perceived Nicholl as "one of his guys." Again, the evidence submitted to this Court suggests only that Migliorini appointed Nicholl as a purely formal act in the discharge of the mayor's executive responsibility to appoint police officers under the municipality's civil service rules. This Court does not find this evidence to be sufficient to conclude as a matter of law that Migliorini possessed a possible temptation to be partial to the word of Nicholl over DePiero within the meaning of *Ward*. A finding that Mayor Mighorini possesses a possible temptation to be partial to Nicholl on the evidence presented in this case would indicate that no contested traffic case could constitutionally be tried in mayor's court where the mayor had executive responsibility for, appointing the ticketing police officer. This Court is reticent to reach such *per se* rule in fight of the dramatically different holding in *Ward*.

For all of these reasons, this Court does not conclude that DePiero's trial before Mayor Migliorini on

DePiero's contested traffic case violated his due process rights. Accordingly, the Court denies DePiero's motion for summary judgment on his due process claims arising from Migliorini's presiding over DePiero's traffic case.

C. Mayor Migliorini "lacked jurisdiction" to hear DePiero's contempt case.

DePiero also argues that his due process rights were violated because Mayor Migliorini "lacked jurisdiction" to preside over his contempt case. DePiero argues he was entitled to a jury trial on the contempt charge under Ohio Revised Code §§ 2937.08 and 2705.02. (DeP. Br. at 10-11.) Ohio Rev. Code §§ 2937.08 and 2938.04 require the magistrate in a court not of record, such as a mayor's court, to transfer any case in which the accused has a right to a jury trial to a court of record unless the accused waives his right to a jury trial in writing. DePiero asserts and defendants do not dispute that DePiero had a right to a jury trial on the contempt charge against him pursuant to Ohio Rev. Code § 2945.17[24] and did not waive his right to a jury trial in writing.

DePiero made the argument that Migliorini lacked jurisdiction to conduct a trial on the criminal contempt charge in his original motion for summary judgment. In

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[24] Section 2945.17 states:

At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of one hundred dollars, the accused has the right to be tried by a jury.

denying DePiero's original motion, this Court noted that Section 1983 pertains only to violations of federal constitutional or statutory rights, and DePiero had not argued or explained how Migliorini's infraction of DePiero's state created right to a jury trial on his contempt case amounted to a violation of his substantive due process rights under the United States Constitution. *(See* June 19 Mem. of Op. at Ord. at 11, n. 6.)

DePiero now asserts that his constitutional due process rights were violated by Migliorini's hearing his contempt case because due process requires a hearing before a person with "jurisdiction to preside," and Migliorini did not have jurisdiction to preside over his contempt case under Ohio law. In DePiero's words:

> While official conduct that allegedly violates state law does not by itself implicate § 1983, the failure of Plaintiff DePiero to waive his statutory right to a jury trial denied Migliorini jurisdiction under Ohio law to conduct a trial. Because Defendant Migliorini lacked jurisdiction to conduct a trial and because a defendant has a constitutional right of due process 'to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside,' *Gomez v. United States*, [490 U.S. 858], this additional action of Defendant Migliorini in trying Plaintiff DePiero on the

> contempt charge has denied Plaintiff his right to Due Process under the Fourteenth Amendment.

(DeP. Br. at 12-13.)

In support of his argument, DePiero relies not only on *Gomez v. United States*, 490 U.S. 858 (1989), but *Schorle v. City of Greenhills,* 524 F. Supp. 821 (S.D. Ohio 1981) as well. The Court does not read either of DePiero's cases to support the proposition that Migliorini's failure to afford DePiero his state created right to a jury trial amounts to a violation of DePiero's constitutional due process rights.

Gomez reversed defendants' felony convictions on narcotics-related charges where a magistrate judge, not a district judge, presided over voir dire of the jury at trial. The Court concluded that presiding over jury selection in a felony trial is not one of the duties a magistrate judge may perform under the Federal Magistrates Act. The Court further held that it was not harmless error for the magistrate judge, over defendants' objection, to "exceed his jurisdiction" under the Federal Magistrates Act. 490 U.S. at 876. The Court stated:

> The Government concedes, as it must, that errors occurring during jury selection may be grounds for reversal of a conviction. Yet it argues that any error in these cases was harmless because petitioners allege no specific prejudice as a result of the Magistrate's conducting the voir dire

> examination. We find no merit to this argument. Among those basic fair trial rights that 'can never be treated as harmless' is a defendant's 'right to an impartial adjudicator, be it judge or jury.' Equally basic is a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside. The harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury.

Id (citations omitted.)

Although defendants do not address *Gomez*, this Court finds the case distinguishable. Unlike *Gomez*, there is no suggestion that DePiero's contempt case was a felony matter, and there is no evidence that Migliorini proceeded to hear DePiero's contempt case over DePiero's objection. Indeed, there is no evidence in the record at all as to the contempt proceeding or whether DePiero presented any evidence to defend against it.[25] Conversely, there is evidence that the contempt charge was ultimately dismissed

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[25] Defendants suggest and DePiero does not take issue with the suggestion that the Mayor's failure to procure a waiver from DePiero was an "unwitting" oversight and that he acted in good faith in hearing the case. *(See* Def. Br. at 9, Def. Br. at Ex. A, 114; Def. Rep. at 2.)

by the prosecutor in subsequent state court proceedings. This Court therefore concludes that, unlike *Gomez*, the harmless error analysis is appropriate here.

Schorle v. City of Greenhills, 524 F. Supp. 821 (S.D. Ohio 1981) is a mayor's court case similar to the facts herein that a mayor heard and decided a case as to which the defendant had a statutory right to a jury trial. *Schorle*, however, did not hold that the mayor's presiding over defendant's trial amounted to a violation of the defendant's due process rights. Instead, *Schorle* held that the mayor was not entitled to judicial immunity for his actions. The Court stated.

> The doctrine of judicial immunity protects a judge from being held liable under § 1983 for any actions taken while he is acting within his jurisdiction... A judge will not be deprived of such immunity because the action he took was error, was done maliciously, or was in excess of his authority. Yet, judicial immunity in this context is not absolute. A judge may be subject to liability when he has acted in the 'clear absence of all jurisdiction.' . . . When a judge knows he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost.

Schorle, 524 F. Supp. at 828. Thus, while *Schorle* may be instructive on the question of whether Mayor Migliorini is entitled to judicial immunity for his actions in this case, it does not establish that Migliorini's hearing DePiero's contempt case violated DePiero's due process rights. Furthermore, this case is distinguishable from *Schorle.* In *Schorle,* the mayor presided over the defendant's case in the face of an express refusal by the defendant to waive his right to a jury trial. There is no evidence that DePiero was asked but refused to waive his right to a jury trial here. Rather, the parties' briefs suggest that the issue was never raised.

In short, this Court does not read *Gomez* and *Schorle* to demonstrate that DePiero has a substantive claim for the violation of his constitutional due process rights as a result of Migliorini's presiding over DePiero's contempt case. Therefore, the Court denies DePiero's motion for summary judgment on DePiero's § 1983 claim alleging that his due process rights were violated as a result of Migliorini's hearing the contempt case.

II. Defendants' Motion.

Defendants move for summary judgment on Counts I, II and VI. *(See* Def. Br.) In addition to disputing DePiero's assertions that his due process rights were violated by the Mayor's presiding over his traffic case, defendants argue they are entitled to summary judgment on Counts I and II because the Mayor is entitled to absolute

judicial and/or qualified immunity for his actions, (Def. Br. at 9-10; Rep. at 2-5), and the Mayor "[w]hile acting in his judicial capacity ... would not be operating as a policyrnaker for the City. . ." (Rep. Br. at 7.) Defendants argue that they should be granted summary judgment on DePiero's state law malicious prosecution claim because while Nicholl admittedly erroneously cited DePiero for violating Ordinance 351.12, DePiero had parked his car in violation of another city ordinance. (Def Br. at 12.)

In order to demonstrate a cause of action under § 1983, a plaintiff must demonstrate that he was deprived of a right "secured by the Constitution or laws of the United States ..." *Flagg Brothers Inc., v. Brooks,* 436 U.S. 149, 155 (1978). Because the Court has concluded that DePiero has not demonstrated a violation of his constitutional rights as a matter of law, his federal claims fail as a matter of law, and no genuine issue requiring trial remains with respect to the federal claims. Therefore, the Court grants defendants' motion for summary judgment in their favor on Counts I and II. It is not necessary to address defendants' arguments that the Mayor is entitled to immunity and the Mayor's actions in serving as judge do not constitute official city policy for purposes of § 1983.

In light of the Court's disposition on Counts I and II, no federal claim remains in the case. Therefore, the Court dismisses DePiero's remaining state law claim for malicious prosecution (Count VI) for lack of the presence of a viable federal claim. *See Pilgrim v. Littlefield,* 92 F.3d

413, 417 (6th Cir. 1996) ("Without a viable federal claim in the case, and absent some compelling basis for retaining supplemental jurisdiction, there [is] no reason for the district court not to dismiss the case.")

Conclusion

For the reasons set forth above, the Court denies plaintiff's motion for summary judgment on Counts I and II (doc. 39), grants defendants' motion for summary judgment on Counts I and II (doc. 44) and dismisses Count VI for lack of the presence of a viable federal claim in the case.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Christopher DePiero,	)	CASE NO. 5: 95 CV 2405
	)	
Plaintiff,	)	Judge Patricia A. Gaughan
	)	
vs.	)	**Judgment Entry**
	)	
City of Macedonia et al.,	)	U.S. Dist Ct. Filed 2/17/98
	)	
Defendants.	)	

The Court, having filed its Memorandum of Opinion and Order denying plaintiff's motion for summary judgment on Counts I and II (doc. 39) and granting defendants' motion for summary judgment on Counts I and II (doc. 44), hereby enters judgment in favor of defendants and against plaintiff. The Court dismisses plaintiffs state law claim in Count VI without prejudice.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

CONSITUTION OF THE UNITED STATES OF AMERICA
AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxes. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,15 and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office civil or military, under

the United **States, or under any State,** who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, or support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. ,But Congress may by a of two-thirds of each House, remove such disability.

SECTION 4. The valïdity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Title 42

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§ 1983

Civil action for deprivation of rights

Every person who, under color of any statue, ordinance, regulation, custom, or- usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

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OHIO CONSTITUTION

O Const IV § 1 Judicial power vested in courts

The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law.

§ 1901.01 Municipal courts established.

There is hereby established a municipal court in each of the following municipal corporations:
Akron, Alliance, Ashland, Ashtabula, Athens, Avon Lake, Barberton, Batavia, Bedford, Bellefontaine, Bellevue, Berea, Bowling Green, Bryan, Bucyrus, Cambridge, Campbell, Canton, Celina, Chardon, Chesapeake, Chillicothe, Cincinnati, Circleville, Cleveland, Cleveland Heights, Columbus, Conneaut, Coshocton, Cuyahoga Falls, Dayton, Defiance, Delaware, East Cleveland, East Liverpool, Eaton, Elyria, Euclid, Fairborn, Fairfield, Findlay, Fostoria, Franklin, Fremont, Gallipolis, Garfield Heights, Girard, Hamilton, Hillsboro, Huron, Ironton, Jackson, Kenton, Kettering, Lakewood, Lancaster, Lebanon, Lima, Logan, London, Lorain, Lyndhurst, Mansfield, Marietta, Marion, Marysville, Mason, Massillon, Maumee, Medina, Mentor, Miamisburg, Middletown, Mount Vernon, Napoleon, Newark, New~Philadelphia, Newton Falls, Niles, Norwalk, Oakwood, Oberlin, Oregon, Painesville, Parma, Perrysburg, Port Clinton, Portsmouth, Ravenna, Rocky River, Sandusky, Shaker Heights, Shelby, Sidney, South Euclid, Springfield, Steubenville, Struthers, Sylvania, Tiffin, Toledo, Troy, Upper Sandusky, Urbana, Vandalia, Van Wert, Vermilion, Wadsworth, Wapakoneta, Warren, City of Washington in Fayette county, to be known as Washington Court House, Willoughby, Wilmington, Wooster, Xenia, Youngstown, and Zanesville.

OHIO REVISED CODE § 1905.01

Jurisdiction in ordinance cases and traffic violations.

(A) In all municipal corporations not being the site of a municipal court nor a place where a judge of the Auglaize county, Crawford county, Jackson county, Miami county, Portage county, or Wayne county municipal court sits as required pursuant to section 1901.021 [1901-021.1] of the Revised Code or by designation of the judges pursuant to section 1901.021 [1901.02.1] of the Revised Code, the mayor of the municipal corporation has jurisdiction, except as provided in divisions (B), (C), and (E) of this section and subject to the limitation contained in section 1905.03 and the limitation contained in section 1905.031 [1905.03.1] of the Revised Code, to hear and determine any prosecution for the violation of an ordinance of the municipal corporation, to hear and determine any case involving a violation of a vehicle parking or standing ordinance of the municipal corporation unless the violation is required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521. of the Revised Code, and to hear and determine all criminal causes involving any moving traffic violation occurring on a state highway located within the boundaries of the municipal corporation, subject to the limitations of sections 2937.08 and 2938.04 of the Revised Code. (B)(1) In all municipal corporations not being the site of a municipal court nor a place where a judge of a court listed in division (A) of this section sits as required pursuant to section 1901.021 [1901.0211] of the Revised Code or by designation of the judges pursuant to section 1901.021

[1901.02.11 of the Revised Code, the mayor of the municipal corporation has jurisdiction subject to the limitation contained in section 1905.03 of the Revised Code, to hear and determine prosecutions involving a violation of an ordinance of the municipal corporation relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse or relating to operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine, and to hear and determine criminal causes involving a violation of section 4511.19 of the Revised Code that occur on a state highway located within the boundaries of the municipal corporation, subject to the limitations of sections 2937.08 and 2938.04 of the Revised Code, only if the person charged with the violation, within six years of the date of the violation charged, has not been convicted of or pleaded guilty to any of the following: (a) violation of an ordinance of any municipal corporation relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse or relating to operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine; (b) A violation of section 4511.19 of the Revised Code; (c) A violation of any ordinance of any municipal corporation or of any section of the Revised Code that regulates the operation of vehicles, streetcars, and trackless trolleys upon the highways or streets, in relation to which all of the following apply:

(i) The person, in the case in which the conviction was obtained or the plea of guilty was entered, had been charged with a violation of an ordinance of any municipal

corporation relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse or relating to operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine, or with a violation of section 4511.19 of the Revised Code; (ii) The charge of the violation described in division (B)(1)(c)(i) of this section was dismissed or reduced; (iii) The violation of which the person was convicted or to which the person pleaded guilty arose out of the same facts and circumstances and the same act as did the charge that was dismissed or reduced. (d) A violation of a statute of the United States or of any other state or a municipal ordinance of a municipal corporation located in any other state that is substantially similar to section 4511.19 of the Revised Code.

(2) The mayor of a municipal corporation does not have jurisdiction to hear and determine any prosecution or criminal cause involving a violation described in division (B)(1)(a) or (b) of this section, regardless of where the violation occurred, if the person charged with the violation, within five years of the violation charged, has been convicted of or pleaded guilty to any violation listed in division (B)(1)(a), (b), (c), or (d) of this section.

If the mayor of a municipal corporation, in hearing a prosecution involving a violation of an ordinance of the municipal corporation the mayor serves relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse or relating to operating, a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine, or in hearing a

criminal cause involving a violation of section 4511.19 of the Revised Code, determines that the person charged, within five years of the violation charged, has been convicted of or pleaded guilty to any violation listed in division (B)(1)(a), (b), (c), or (d) of this section, the mayor immediately shall transfer the case to the county court or municipal court with jurisdiction over the violation charged, in accordance with section 1905.032 [1905.03.2] of the Revised Code.

(C)(1) In all municipal corporations not being the site of a municipal court and not being a place where a judge of a court listed in division (A) of this section sits as required pursuant to section 1901.021 [1901.02.1] of the Revised Code or by designation of the judges pursuant to section 1901.021 [1901.02.1] of the Revised Code, the mayor of the municipal corporation, subject to sections 1901.031 [1901.03.1], 2937.08, and 2938.04 of the Revised Code, has jurisdiction to hear and determine prosecutions involving a violation of a municipal ordinance that is substantially equivalent to division (B)(1) or (D)(2) of section 4507.02 of the Revised Code and to hear and determine criminal causes that involve a moving traffic violation, that involve a violation of division (B)(1) or (D)(2) of section 4507.02 of the Revised Code, and that occur on a state highway located within the boundaries of the municipal corporation only if all of the following apply regarding the violation and the person charged: (a) Regarding a violation of division (B)(1) of section 4507.02 of the Revised Code or a violation of a municipal ordinance that is substantially equivalent to that division, the person

charged with the violation, within five years of the date of the violation charged, has not been convicted of or pleaded guilty to any of the following: (i) A violation of division (B)(1) of section 4507.02 of the Revised Code; (ii) A violation of a municipal ordinance that is substantially equivalent to division (B)(1) of section 4507.02 of the Revised Code; (iii) A violation of any municipal ordinance or section of the Revised Code that regulates the operation of vehicles, streetcars, and trackless trolleys upon the highways or streets, in a case in which, after a charge against the person of a violation of a type described in division.
(C)(1)(a)(i) or (ii) of this section was dismissed or reduced, the person is convicted of or pleads guilty to a violation that arose out of the same facts and circumstances and the same act as did the charge that was dismissed or reduced.
(b) Regarding a violation of division (D)(2) of section 4507.02 of the Revised Code or a violation of a municipal ordinance that is substantially equivalent to that division, the person charged with the violation, within five years of the date of the violation charged, has not been convicted of or pleaded guilty to any of the following:
(i) A violation of division (D)(2) of section 4507.02 of the Revised Code,
(ii) A violation of a municipal ordinance that is substantially equivalent to division (D)(2) of section 4507.02 of the Revised Code;
(iii) A violation of any municipal ordinance or section of the Revised Code that regulates the operation of vehicles, streetcars, and trackless trolleys upon the highways or streets in a case in which, after a charge against the person

of a violation of a type described in division (C)(1)(b)(i) or (ii) of this section was dismissed or reduced, the person is convicted of or pleads guilty to a violation that arose out of the same facts and circumstances and the same act as did the charge that was dismissed or reduced.

(2) The mayor of a municipal corporation does not have jurisdiction to hear and determine any prosecution or criminal cause involving a violation described in division (C)(1)(a)(i) or (ii) of this section if the person charged with the violation, within five years of the violation charged, has been convicted of or pleaded guilty to any violation listed in division (C)(1)(a)(i), (ii), or (iii) of this section and does not have jurisdiction to hear and determine any prosecution or criminal cause involving a violation described in division (C)(1)(b)(i) or (ii) of this section if the person charged with the violation, within five years of the violation charged, has been convicted of or pleaded guilty to any violation listed in division (C)(1)(b)(i), (ii), or (iii) of this section.

(3) If the mayor of a municipal corporation. in hearing a prosecution involving a violation of an ordinance of the municipal corporation the mayor serves that is substantially equivalent to division (B)(1) or (D)(2) of section 4507.02 of the Revised Code or a violation of division (B)(1) or (D)(2) of section 4507.02 of the Revised Code, determines that, under division (C)(2) of this section, mayors do not have jurisdiction of the prosecution, the mayor immediately shall transfer the case to the county court or municipal court with jurisdiction over the violation in accordance with section 1905.032 [1905.03.2] of the Revised Code.

(D) If the mayor of a municipal corporation has jurisdiction pursuant to division (B)(1) of this section to hear and determine a prosecution or criminal cause involving a violation described in division (B)(1)(a) or (b) of this section, the authority of the mayor to hear or determine the prosecution or cause is subject to the limitation contained in division (C) of section 1905.03 of the Revised Code. If the mayor of a municipal corporation has jurisdiction pursuant to division (A) or (C) of this section to hear and determine a prosecution or criminal cause involving a violation other than a violation described in division (B)(1)(a) or (b) of this section, the authority of the mayor to hear or determine the prosecution or cause is subject to the limitation contained in division (C) of section 1905.031 [1905.03.1] of the Revised Code.

(E)(1) The mayor of a municipal corporation does not have jurisdiction to hear and determine any prosecution or criminal cause involving any of the following:

(a) A violation of section 2919.25 or 2919.27 of the Revised Code;

(b) A violation of section 2903.11, 2903.12, 2903.13, 2903.211 [2903.21.1], or 2911.211 (2911.21.1] of the Revised Code that involves a person who was a family or household member of the defendant at the time of the violation;

(c) A violation of a municipal ordinance that is substantially equivalent to an offense described in division (E)(1)(a) or (b) of this section and that involves a person who was a family or household member of the defendant at the time of the violation.

(2) The mayor of a municipal corporation does not have jurisdiction to hear and determine a motion filed pursuant to section 2919.26 of the Revised Code or filed pursuant to a municipal ordinance that is substantially equivalent to that section or to issue a protection order pursuant to that section or a substantially equivalent municipal ordinance.

(3) As used in this section, "family or household member has the same meaning as in section 2919.25 of the Revised Code.

(F) In keeping a docket and files, the mayor, and a mayor's court magistrate appointed under section 1905.05 of the Revised Code, shall be governed by the laws pertaining to county courts.

HISTORY: RS §1816; Bates §1536-776; 66 v 169, § 114, 69 v 192, § 117; GC § 4527; 109 v PtII, 1203; Bureau of Code Revision, 10-1-53; 128 v 823 (Eff 11-6-59); 130 v 608 (Eff 10-14-63); 132 v H 361 (Eff 7-25-67); 136 v H 205 (Eff 1-1-76); 137 V H 312 (Eff 1-1-78); 139 v H 707 (Eff 1-1-83); 143 v S 131 (Eff 7- 25-90); 143 v H 837 (Eff 7-25-90); 145 v S 62 (Eff 9-1-93); 146 v H 353 (Eff 9-17-96); 146 v H 670 (Eff 12-2-96); 147 v S 1 (Eff 10-21-97), 147 v S 60. Eff 10-21-97,

OHIO REVISED CODE § 1905.05

Appointment of mayor's court magistrate.

(A) A mayor of a municipal corporation that has a mayor's court may appoint a person as mayor's court magistrate to hear and determine prosecutions and criminal causes in the mayor's court that are within the jurisdiction of the mayor's court, as set forth in section 1905.01 of the Revised Code. No person shall be appointed as a mayor's court magistrate unless the person as been admitted to the practice of law in this state and, for a total of at least three years preceding the person's appointment or the commencement of the person's service as magistrate, has been engaged in the practice of law in this state or served as a judge of a court of record in any jurisdiction in the United States, or both.

A person appointed as a mayor's court magistrate under this division is entitled to hear and determine prosecutions and criminal causes in the mayor's court that are within the jurisdiction of the mayor's court, as set forth in section 1905.01 of the Revised Code. If a mayor is prohibited from hearing or determining a prosecution or cause that charges a person with a violation of section 4511.19 of the Revised Code or with a violation of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse or relating to operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine due to the operation of division (C) of section 1905.03 of the Revised Code, or is prohibited from hearing or determining any other prosecution or cause due to the

operation of division (C) of section 1905.031 (1905.03.1] of the Revised Code, the prohibition against the mayor hearing or determining the prosecution or cause does not affect and shall not be construed as affecting the jurisdiction or authority of a person appointed as a mayor's court magistrate under this division to hear and determine the prosecution or cause in accordance with this section. In hearing and determining such prosecutions and causes, the magistrate has the same powers, duties, and authority as does a mayor who conducts a mayor's court to hear and determine prosecutions and causes in general, including, but not limited to, the power and authority to decide the prosecution or cause, enter judgment, and impose sentence; the powers, duties, and authority granted to mayors of mayor's courts by this chapter, in relation to the hearing and determination of prosecutions and causes in mayor's courts; and the powers, duties, and authority granted to mayors of mayor's courts by any other provision of the Revised Code, in relation to the hearing and determination of prosecutions and causes in mayor's courts. A judgment entered and a sentence imposed by a mayor's court magistrate do not have to be reviewed or approved by the mayor who appointed the magistrate, and have the same force and effect as if they had been entered or imposed by the mayor.

A person appointed as a mayor's court magistrate under this division is not entitled to hear or determine any prosecution or criminal cause other than prosecutions and causes that are within the jurisdiction of the mayor's court, as set forth in section 1905.01 of the Revised Code.

The compensation for the services of a mayor's court magistrate shall be a fixed annual salary set by the legislative authority of the municipal corporation that the magistrate serves and shall be paid by the municipal corporation.

(B) The appointment of a person as a mayor's court magistrate under division (A) of this section does not preclude the mayor that appointed the magistrate, subject to the limitation contained in section 1905.03 and the limitation contained in section 1905.031 [1905.031] of the Revised Code, from also hearing and determining prosecutions and criminal causes in the mayor's court, as set forth in section 1905.01 of the Revised Code.

HISTORY: 143 v. S 131 (Eff 7-25-90); 146 v H 670. Eff 12-2-96.

Not analogous to former RC § 1905.05 (RS § 1819; Bates §1536-780; 66 v. 169, § 114; 69 v. 192 §117; GC §4531; Bureau of Code Revision, 10-1-53), repealed 129 v. S 367, § 2, eff 10-19-61.

OHIO REVISED CODE § 1905.20

Powers of mayors and magistrates in criminal matters.

(A) The mayor of a municipal corporation has, within the corporate limits, all the powers conferred upon sheriffs to suppress disorder and keep the peace.

(B) The mayor of a municipal corporation shall award and issue all writs and process that are necessary to enforce the administration of justice throughout the municipal corporation. The mayor shall subscribe his name and affix his official seal to all writs, process, transcripts, and other official papers. A mayor's court magistrate, in hearing and determining prosecutions and criminal causes that are within the scope of his authority under section 1905.05 of the Revised Code, has the same powers and duties as are granted to or imposed upon a mayor under this division.

(C) The mayor of a municipal corporation shall be disqualified in any criminal case in which he was arresting officer, assisted in the arrest, or was present at the time of arrest, and shall not hear the case.

HISTORY: RS § 1837; Bates § 1536-773a; 66 v 169, § 118; GC § 4549; Bureau of Code Revision, 10-1-53, 125 v 297; 128 v 823(836) (Eff 11-6-59); 141 v H 158 (Eff 3-17-87); 143 v S 131. Eff 7-25-90.

OHIO REVISED CODE § 1905.21

Docket; disposition of receipts; salary, office; seal.

The mayor of a municipal corporation and a mayor's court magistrate shall keep a docket. Neither the mayor of a municipal corporation nor a mayor's court magistrate shall retain or receive for his own use any of the fines, forfeitures, fees, or costs he collects. A mayor's court magistrate shall account for all such fines, forfeitures, fees, and costs he collects and transfer them to the mayor. The mayor shall account for and dispose of all such fines, forfeitures, fees, and costs he collects, including all such fines, forfeitures, fees, and costs that are transferred to him by a mayor's court magistrate, as provided in section 733.40 of the Revised Code.

The mayor of a municipal corporation shall be paid such fixed annual salary as the legislative authority of the municipal corporation provides under sections 731.08 and 731.13 of the Revised Code, and a mayor's court magistrate shall receive compensation as provided in section 1905.05 of the Revised Code.

The mayor of a municipal corporation shall keep an office, provided by the legislative authority of the municipal corporation, at a convenient place in the municipal corporation, and shall be furnished by the legislative authority with the corporate seal of the municipal corporation. In the center of such seal shall be the words, "Mayor of the city of _____," or "Mayor of the village of _____."

OHIO REVISED CODE § 1905.25

Appeal; trial de novo.

An appeal from the mayor's court to the municipal court or county court shall proceed as a trial de novo.

HISTORY. 133 v S 530. Eff 6-12-70.

OHIO REVISED CODE § 1905.28

Contempts; rules.

The mayor or mayor's court magistrate presiding at any trial under this chapter may punish contempts, compel the attendance of jurors and witnesses, and establish rules for the examination and trial of all cases brought before him, in the same manner as judges of county courts.

HISTORY. RS § 1844; Bates § 1536-791; 66 v 180, § 198; GC 4557; Bureau of Code Revision, 10-1-53; 128 v 823(837) (Eff 11-6-59); 143 v S 131. Eff 7-25-90.

OHIO REVISED CODE § 1905.32

Fines and forfeitures recovered.

Fines, penalties, and forfeitures may, in all cases, and in addition to any other mode provided, be recovered by action before any judge of a county court, or other court of competent jurisdiction, in the name of the proper municipal corporation, and for its use. In any action in which a pleading is necessary, it is sufficient if the petition sets forth generally the amount claimed to be due in respect to the violation of the ordinance of the municipal corporation. Such petition shall refer to the title of such ordinance, state the date of its adoption or passage, and show, as near as is practicable, the true time of the alleged violation.

HISTORY: RS § 1864; Bates § 1536-627; 66 v 167, § 108; GC §4561; Bureau of Code Revision, 10-1-53; 128 v 823 (837). Eff 11-6-59.

CHARTER OF CITY OF MACEDONIA
SUMMIT COUNTY
OHIO

Original Adoption May 4,1971
Addition of Section 10.03 adopted May 26, 1977
Amended Sections 3.02, 3.03, 4.06, 8.04, 8.05
Article X111, and 16.01 adopted November 5, 1985
Addition of Article XIV.A. adopted November 5, 1985
Amended Sections 3.02, 4.06, 4.07, 6.09, 7.02, 7.03, 7.05
8.06, 9.05, 10.03, 13.01, 13.04, 13.07, 14. A.3. 17.0 1,
18.02 adopted November 7, 1989
Additions of Sections 10.04, 11.02, 12.04, 13.01.A, and
14.02 adopted November 7, 1989

MAJOR PROVISIONS

1. Form of Government - Mayor - Council form.

2. Mayor - Four year term; responsible for all administrative functions; power to introduce and veto legislation; serves as Director of Public Safety during future years subject to the filling of that position when necessary by reason of population growth.

3. Council - Remains at six members; the present staggered four year terms will continue; responsible for all legislative functions including control of budgets.

4. Financial Officer - The Director of Finance will assume all of the financial duties now handled by Clerk and Treasurer. The Director of Finance will be appointed by the Mayor subject to confirmation by the Council as is customary in the great majority of municipalities.

5. Taxes -No change in Ohio statutory Limitation upon Council; any additional levies beyond the present statutory limitation must be voted by the people.

6. Non-Partisan Politics - No political parties - same us now.

7. Initiative, Referendum, and Recall - These provisions assure utmost control by the people.

8. Charter Review Commission -Council must periodically appoint a review commission to insure that our government continues as modern as it should be.

9. Amendments to Charter - When necessary the voters can bring about amendments to the Charter which they feel are essential.

CHARTER COMMISSION MEMBERS

John Akerstrom
Lorn E. Ash
Areles G. Beer
John T. Craig
Harry J. Crowle
Stuart W. Feils
Paul F. Fike
Ralph J. Griminger
Theodore J. Haas
Mayor Wm. Frew Long
Chief-of-Police Floyd McRitchie
Clerk Sarah Miller
Stanley Oswiecinski
Carlton W.Surplus
Anthony Yen

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MACEDONIA, OHIO
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CHARTER OF THE MUNICIPALITY OF MACEDONIA, OHIO

Preamble

We, the people of the City of Macedonia, in the County of Summit and State of Ohio, in order to secure for ourselves the benefits of municipal home rule and to exercise all the powers of local self-government under the Constitution and the laws of the State of Ohio, do hereby adopt this Charter of our Municipality.

ARTICLE I

The Municipality

Section 1.01 Name

The present Municipality shall continue to be a body politic and corporate, under the name of the City of Macedonia.

Section 1.02 Boundaries

The Municipality shall have the same boundaries as now exist, with the power and authority to change its boundaries and annex other territory contiguous thereto in the manner authorized by the laws of the State of Ohio.

ARTICLE II

Powers of the Municipality

Section 2.01 Powers

The Municipality shall have all the powers, general and special, governmental or proprietary, expressed or implied, which may be possessed or assumed by municipalities under the Constitution and laws of the State of Ohio for local self -government. No enumeration of specific powers in the Charter shall be held to be exclusive. All such powers shall b exercised in the manner prescribed in this Charter, or, if not prescribed herein, in such manner as

Council may determine or, unless a contrary intent appears in this Charter or in the enactments of Council, in such manner as may be provided by the laws of the State of Ohio.

ARTICLE III

Mayor

Section 3.01 Election and Term

The Mayor shall be elected at each regular municipal election beginning in the year 1971 for a term of four (4) years, which term shall commence and he shall assume office on January 3rd next following his election, and shall hold office until his successor is elected and qualified.

Section 3.02 Qualifications

The Mayor shall have been for at least two (2) years prior to the date of his election, and during his term of office shall be, a continuous resident and qualified elector of this Municipality, or territory annexed thereto, and shall have attained the age of twenty-five (25) years. The Mayor shall hold no other elective public office except that he may be a member of any duly constituted Charter Commission. He shall not be otherwise employed by, nor shall he hold any other office in the Municipality except as otherwise provided in this Charter or by ordinance enacted thereunder.

Section 3.03 Duties and Powers

(a) Executive Powers. The mayor shall be the chief executive officer of the Municipality. He shall:

1.Be the head of the Department of Public Safety,

2.supervised the administration of the Municipal affairs,

3.exercise control over all departments and divisions thereof, except Council

4. be chief conservator of the peace and cause all laws to be enforced

5. enforce performance under contracts

6. recommend to Council measures expedient for the welfare of the Municipality and keep Council informed of the condition and future of the Municipality

7. act as official and ceremonial head of the government,

8. execute all contracts, conveyances, evidences of indebtedness, and all other instruments to which the Municipality is a party, along with the Director of Public Service where required by Ordinance,

9. have custody of the seal and may affix it as deemed proper,

10. perform other duties as required by the Charter, the Council, and the laws of the State of Ohio,

11. subject to other provisions of the Charter, have the power to appoint, promote, discipline, transfer, reduce, or remove any official or employee, except those elected under the Charter and except employees of Council. Department heads shall be appointed by the Mayor subject to confirmation of a majority vote of those members elected to Council, or Council may disaffirm by a two-thirds (2/3) affirmative vote. In the event of Council's failure to act in either manner within thirty (30) days after

notification by the Mayor, the appointment is automatically confirmed,

12. prepare an annual budget and submit same to Council,

13. have all other executive powers provided for mayors of municipalities in the Revised Code of the State of Ohio.

(b) Legislative Powers:

1. The Mayor shall preside at all Council meetings, be given a voice in the deliberation of Council, but shall have no vote except in the case of a tie vote,

2. The heads of the departments shall be given the opportunity to participate in deliberations of Council on legislation pertaining to their departments but shall have no vote,

3. The Mayor shall have the right to recommend and introduce legislation to Council,

4. The Mayor shall review the minutes of the meetings of Council as prepared by the Clerk of Council and may present written or oral objections thereto any meeting.

(c) Veto Powers. The Mayor shall have five (5) days in which to approve or disapprove every ordinance or resolution adopted by the Council. If the Mayor disapproves said measure he shall within five (5) days after its adoption return the measure to the Clerk of Council with his written objections thereon, which objections shall be entered in full on the journal of the council. If the Mayor does not sign or so return an ordinance or resolution with the five (5) day period, it shall take effect in the same

manner as if he had signed it. The Mayor may approve or disapprove the whole or any item of an ordinance or resolution appropriating money, but otherwise his approval or disapproval shall be addressed to the entire ordinance or resolution. When the mayor has disapproved an ordinance or resolution, or a part or item thereof as herein provided, the Council shall, not later than its next regular meeting, proceed to reconsider it, and if upon reconsideration the ordinance or resolution or part or item thereof disapproved by the Mayor be approved by the affirmative vote of at least two-thirds (2/3) of the members elected to Council, it shall then take effect without the signature of the Mayor in the same manner as if he had signed it. In all such cases, the vote shall be taken by yeas and nays and entered upon the journal.

(d) Judicial Powers. The Mayor shall have all the judicial powers granted from time to time by the general laws of the State of Ohio to mayors of municipalities of the class of the Municipality.

Section 3.04 Absence and Vacancy

(a) Absence. When the Mayor is absent from the Municipality, or for any reason is unable to perform his duties as Mayor, the President of Council shall become the acting Mayor, and while so acting shall have and exercise all the powers of the Mayor, but he shall not thereby cease to be the President of Council. In the event the President of Council is absent from the Municipality, or for any reason is unable to perform his duties as acting Mayor, the Vice President of Council shall become the acting Mayor, and while so acting shall have all the powers and duties of the

Mayor, but he shall not thereby cease to be Vice President of Council.

(b) Vacancy. If the office of Mayor becomes vacant, the President of Council shall forthwith become Mayor and shall be qualified to fill said position within thirty (30) days after the date the vacancy occurs, as such date is determined by Council. The Vice President shall then become President of Council. The Vice President of Council is also qualified to become Mayor if for any reason the President of Council fails to qualify as Mayor. When the President or vice President of Council ascends to the position of mayor, he shall serve as Mayor until a successor is elected by the voters and qualified. Provided further that if a vacancy in the Mayor's office occurs within the first two years of the four year term, Council shall forthwith pass legislation fixing a special election for the office of mayor in order that a mayor shall be elected by the voters of the municipality of Macedonia to serve during the remainder of the term of any mayor who for any reason unable to complete his term. Any vacancy occurring in Council by reason of the President or Vice President ascending to the Mayor's position, shall be filled pursuant to the provisions of 4.12 of Article IV and new President of Vice President, as the case may be, shall be elected by Council. If Council shall pass legislation to hold a special election for the office of Mayor under the provision of the section, then no councilman shall be appointed to fill a vacnat Council seal until after such special election and the councilman serving as Mayor shall have a vote in Council, until the date of the special election.

ARTICLE IV

Council

Section 4.01 Legislative Authority

All legislative power of the Municipality under this Charter, together with all such powers conferred upon Municipal legislative bodies by the Constitution and laws, of the State of Ohio, shall be vested in the Council which shall consist of six (6) members, elected at large. Each Councilman shall have authority to introduce ordinances and resolutions or offer motions at regular or special meetings of Council.

Section 4.02 Composition, Term and Qualification

Council shall be comprised of six (6) members all of whom shall be elected at large for a term of four years.

All councilmen in office at the time of the adoption of this Charter shall retain their respective offices until the expiration of their respective terms. The qualifications, term, election, duties and removal of Councilmen shall be in accordance with the provisions of the Revised Code of the State of Ohio with respect to City Councilmen except as provided in the Charter.

Each Councilman shall have been a resident of the Municipality of Macedonia for a period of two (2) years prior to the date of his election. a qualified elector, a continuous resident of the Municipality during his term, and shall hold no other public office or be otherwise employed by the Municipality of Macedonia.

Section 4.03 President and Vice President of Council

At the first regular meeting of Council in January of each year, as provided in Section 4.06 of this Article, Council shall, by majority vote, elect from its membership a President of Council and Vice President of Council, each to serve a term of one (1) year and until his successor is elected and qualified. The President and Vice President of Council, by virtue of holding such offices or in performing the duties of Acting Mayor, as provided in Section 3.02 (a) of Article III in this Charter, shall not he deprived of their powers and rights or be relieved of any of their duties or obligations as members of Council.

Section 4.04 Clerk of Council

The Clerk of Council shall keep an accurate and complete journal of all proceedings of Council, authenticate by the Clerk's signature, have custody of all laws, ordinances, and resolutions of Council, have custody of all official documents, reports, papers, communications and files of Council, and perform such other duties as the Council shall require. During the absence or disability of the clerk of Council, Council shall appoint someone to perform all the duties of that office.

Section 4.05 Rules and Journal of Council

Council shall adopt its own rules, regulations, or by-laws and shall keep a journal of all its proceedings. The journal shall be open for public inspection at all reasonable times. Nothing in this Charter shall invalidate or in any way affect rules, regulations, and by-laws previously adopted by council, unless inconsistent with the provisions of this Charter.

Section 4.06 Regular Meetings

The Mayor shall ensure the first regularly scheduled meeting of Council of each year, but not later than January 15th of each year, Council shall convene and organize at the Council Chambers of the Municipality. The Mayor, or one appointed by the Mayor, shall preside as Chairman. Thereafter, Council shall meet at such times as may be prescribed by its rules, regulation, by-laws or by ordinance or resolution, except that it shall hold regular meetings at least once during each calendar month. All regular meetings of Council shall be held at the Council Chambers and shall be open to the public in accordance with state law.

Section 4.07 Special Meetings

Special meetings of Council may be called as provided by its rules, regulations, and by-laws or by ordinance or resolution, and shall be open to the public in accordance with slate law.

Section 4.08 Quorum

Four (4) members of Council shall constitute a quorum to transact business, but a lesser number may adjourn from time to time and compel the attendance of absent members in such manner and under such penalties as may be prescribed by the Revised Code of the State of Ohio.

Section 4.09 Powers and Duties of Council

The Council may by ordinance make provision for:

(a) the time and place of regular meetings or Council.

(b) the method of giving public notice of the enactment of its ordinances and resolutions.

(c) the form and method of enactment of its ordinances and resolutions, provided that no legislation can be passed or adopted by Council unless read fully on three (3) different days, unless Council waives such requirement by affirmative vote of three-fourths (3/4) of the members elected to Council.

Council shall exercise by ordinance, resolution, or motion all powers of local self-government not inconsistent with this Charter or the Constitution of the United States and the State of Ohio.

Unless Council by rule or regulation expresses contrary intention, its conduct of meetings and the form and method of enactment of legislation shall be in accordance with the general laws of the State of Ohio.

Section 4.10 Effective Date of Ordinances and Resolutions

Each ordinance or resolution providing for:

(a) the appropriation of money;

(b) an annual tax levy;

(c) improvement petitioned for by the owners of a majority of the foot frontage of the property benefited and to be specifically assessed therefor; and

(d) any emergency ordinance or resolution necessary for the immediate preservation of the public peace, health or safety;

shall take effect, unless a later time be specified therein, upon its signature by the Mayor, or upon the expiration of

the time within which it may be disapproved by the Mayor, or upon its passage after its disapproval by the Mayor, as the case may be.

All other ordinances and resolutions shall take effect and be operative in the manner provided by the general laws of the State of Ohio.

Each emergency measure shall contain a statement of the necessity of such emergency action and shall require the affirmative vote of two-thirds (2/3) of the members elected to Council for its enactment.

None of the following types of ordinances or resolutions shall be enacted as an emergency measure;

(a) relating to any change in the boundaries;

(b) providing for the surrender or joint exercise of any of its powers;

(c) granting any franchise; or

(d) contracting for the supply to the municipality or its inhabitants of the products of service of any utility, whether municipally owned or not.

Section 4.11 Employees of Council

Council may employ such employees as it may deem necessary for the proper discharge of its legislative duties. Any person employed by the Council shall serve at the pleasure of the Council and shall not be subject to Civil Service regulations.

Section 4.12 Vacancies

Any vacancy in the Council or an office thereof shall be filled by majority vote of all remaining members of Council. In the event council should fail to fill a vacancy in the office of a Councilman within thirty (30) days from

the date such vacancy occurs, then the power of Council to do so shall lapse and the Mayor shall fill it by appointment within thirty (30) days thereafter. The person elected or appointed to fill a vacancy shall have the qualifications for the particular office specified in Section 4.02 of the Article, and shall hold office for the unexpired term, and until his successor is elected and qualified. When a councilman is elected by Council or appointed by the Mayor to fill a vacancy, such election or appointment shall qualify the councilman in all respects as if he had been elected by the voters.

Section 4.13 Removal

The Council shall be the judge of the election and qualifications of its own members. It may remove any member for gross misconduct, or malfeasance in or disqualification for office, or for the conviction while in office, or while being a Councilman-elect, of a crime involving moral turpitude, or if adjudicated legally incompetent, or for a violation of his oath of office, or persistent failure to abide by the rules of Council; provided however, that such removal shall not take place without the affirmative vote of four of the five remaining members of Council nor until the accused member shall have been notified in writing of the charge against him at least ten days in advance of a public hearing upon such charge, and he or his counsel has been given an opportunity to be heard, present evidence, or examine any witness appearing in support of the charge. The accused member shall not vote on the question of his removal.

Section 4.14 Departments, Boards and Commissions

Council may establish additional departments, boards and commissions as the needs of the Municipality may require. Except for those established herein, Council may abolish or combine departments, boards, and commissions in any manner as it deems necessary. Where organization, powers and duties departments, boards and commissions are not expressly provided herein they shall be provided by resolution or ordinance of Council.

ARTICLE V

Mayor's Court

Section 5.01

The Mayor may in his discretion hold Mayor's Court, pursuant to the Statutes of the State of Ohio.

ARTICLE VI

Department of Finance

Section 6.01 Appointment of Director of Finance

The Director of Finance shall be the head of the Department of Finance and shall be appointed by the Mayor subject to confirmation by a majority of those members elected to Council.

Section 6.02 Qualifications of Terms

The Director of Finance shall have knowledge of municipal accounting, taxation, budgets and financial control.

The Director of Finance shall serve until removal from office as provided in Section 6.09 herein or upon written resignation.

Section 6.03 Duties of General

The Director of Finance shall under the general supervision of the Mayor:

(a) keep the financial accounts of the Municipality, including taxes and assessments, monies due, and all receipts and disbursements by the Municipality,

(b) be the custodian of all monies of the Municipality and shall perform the functions of Treasurer of the Municipality,

(c) assist the Mayor and Council in the preparation of estimates, budgets, and appropriations, and shall keep the Mayor and council informed as to the financial condition of the Municipality from time to time as the mayor may request,

(d) examine all payrolls, bills, and other claims against the Municipality and shall issue no warrant unless he shall find that the claim is in proper form, correctly computed, duly approved, and that it is due and payable and that an appropriation has been made therefor,

(e) perform such other duties assigned by Council or as are required of the Financial offices of municipalities pursuant to the Statutes of the State of Ohio.

Section 6.04 Duties of the Clerk of Council

The Director of Finance shall also serve as Clerk of the Council pursuant to Section 4.04 hereof and the provisions of statutes of the State of Ohio pertaining to the position of the Clerk of Council.

At such time as Council determines it necessary and appropriate they may also appoint a Clerk of Council, separate and apart from the position of the Director of Finance and such Clerk of Council shall perform the duties

specified in Section 4.04 of this Charter. In such event the Director or Finance shall relinquish the duties of the Clerk of Council.

Section 6.05 Elimination of the Positions of Clerk and Treasurer

Upon appointment and qualifications of the Director of Finance the positions of Clerk and Treasurer heretofore existing in the Municipality of Macedonia shall be eliminated and the Director of Finance shall assume all the duties of each office.

Section 6.06 Deputy Director of Finance

Council may by ordinance provide for the creation of the position of Deputy Director of Finance. The Deputy Director of Finance shall be qualified to perform all of the duties of the Director of Finance and shall advise, counsel, and assist the Director of Finance in the performance of all or any duties of the Director of Finance in this Charter and shall serve as tile Director of Finance in the event of absence or illness of the Director of Finance. The Deputy Director of Finance shall be paid such compensation and serve for such period as determined by Council.

Section 6.07 Auditor

Council may by ordinance make such provision for the employment of a qualified accountant to audit the books of the Department of Finance as it deems necessary and appropriate. The Auditor shall be under the general supervision of Council.

Section 6.08 Staff of the Department of Finance

The Department of Finance shall include such other employees as are determined necessary by the Council; said

employees shall work under the general supervision of the Director of Finance, shall he appointed by the Mayor, subject to confirmation by the Council.

Section 6.09 Removal

The Director of Finance can be removed by the Mayor if a majority of the members elected to Council approve such removal by vote at a regularly scheduled meeting of Council. The Director of Finance can be removed by Council by a five-sixths (5/6) affirmative vote of the 12 members elected to Council.

ARTICLE VII

Department of Public Service

Section 7.01 Appointment of the Director of Public Service

The Director of Public Service shall be the head of the Department of Public Service and serve under the general supervision of the Mayor. He shall be appointed by the Mayor subject to the confirmation of the majority of the members elected to Council.

Section 7.02 Qualifications and Term

The Director of Public Service shall be qualified by training and experience to direct the operation of the Department of Public Service.

The Director of Public Service shall serve until removal as provided in Section 7.05 hereof, or upon written resignation.

Section 7.03 Duties In General

The Director of Public Service shall under the general supervision of the Mayor:

(a) manage, conduct, and supervise all operations of the municipally-owned utilities,

(b) make investigations and analyses of finances of the municipally-owned utilities, and make recommendations to the Mayor and the Council concerning all charges and rates to be made for services rendered and all extensions and curtailments of service,

(c) make investigations and recommendations to Mayor and the Council concerning all new construction, maintenance, and replacement of existing municipally -owned utilities, facilities and equipment, and submit plans for future operations of the same,

(d) be responsible for the construction. improvement, repair and maintenance of all public streets and alleys, public buildings, drains, ditches, and storm sewer facilities,

(e) make investigations and recommendations to the Mayor and Council concerning bids for public contract upon authorization of Council. The Director of Public Service shall have complete authority to determine the lowest and best bidder and enter into contracts for amounts not to exceed the limits established by state law, unless otherwise specified by Council,

(f) supervise the lighting, sprinkling, and cleaning of public streets and places,

(g) act as the purchasing agent for the municipality and have such powers and duties in connection therewith as prescribed by Council,

(h) assist the Mayor in the performance of the Mayor's duties that may be delegated by the Mayor, and

(i) have such other powers and duties as may be prescribed by ordinance of Council and the Statutes of the State of Ohio if not inconsistent with this Charter pertaining to the position of the Director of Public Service.

Section 7.04 Staff of the Department of Public Service

The Department of Public Service shall include such other employees as are determined necessary by the Council; said employees shall work under the general supervision of the head of the Department of Public Service, shall be appointed by the Mayor, subject to confirmation of the Council.

Section 7.05 Removal

The Director of Public Service can be removed by the Mayor if a majority of life members elected to Council approve such removal by vote at a regularly scheduled meeting of Council. The Director of Public Service can be removed by Council by a five-sixths (5/6) affirmative vote of the members elected to Council.

ARTICE VIII

Department of Public Safety

Section 8.01 Appointment of the Director of Public Safety

The Director of Public Safety shall be the head of the Department of Public Safety. The Mayor, in addition to his other duties, shall be, and shall perform the duties of, the Director of Public Safety, until such time as Council may determine that is is in the best interest of the Municipality to appoint some other person to that office. Upon making such determination the Council shall declare the office of Director of Public Safety vacant, and the Director of Public Safety shall then be appointed by the Mayor with confirmation of the majority of the members elected to Council.

Section 8.02 Qualifications and Term

The Director of Public Safety shall be qualified by training and experience to direct the operation of the Police Department and Fire Department.

The Director of Public Safety shall serve until removal as Provided in Section 8.06 hereof, or upon written resignation.

Section 8.03 Duties In General

The Director of Public Safety shall under the general supervision of the Mayor be the head of the Police and Fire Departments and shall be responsible for the enforcement of all police, fire, health, safety. and sanitary regulations that may be prescribed by resolutions and ordinances of the Municipality or the laws of the State of Ohio.

Section 8.04 Police Department

The Police Department shall consist of a Chief of Police and such other officers, patrolmen, and personnel as established by Council by ordinance or resolution. All officers, patrolmen, and personnel shall be appointed by the Director of Public Safety in accordance with Civil Service regulations of this Charter, the Statutes of the State of Ohio, and the provisions of this section. Appointments shall be made for the appropriate probationary period of continuous service, and such appointments shall be deemed finally made until the appointees have satisfactorily served their probationary period. Thirty (30) days before the end of the probationary period, the Safety Director shall transmit to Council a record of each em-

ployee's service with his recommendations thereon; and with the concurrence of Council by resolution, the Safety Director may remove or finally appoint the employee, as the case may be. The Police Department shall perform all duties established by the Statutes of the State of Ohio or the Ordinances of Council.

Section 8.05 Fire Department

(a) The Fire Department shall consist of a Fire Chief and such other officers, firemen and personnel as established by Council by ordinance or resolution. All regular officers, firemen, and personnel shall be appointed by the Director of Public Safety in accordance with Civil Service regulations of this Charter, the Statutes of the State of Ohio, and the provisions of this section. Appointments of regular personnel shall be made for the appropriate probationary period of continuous service, and such appointments shall

not be deemed finally made until the appointees have satisfactorily served their probationary period. Thirty (30) days before the end of the probationary period, the Safety Director shall transmit to Council a record of each regular employee's service with his recommendations thereon; and with the concurrence of Council by resolution, the Safety Director may remove or finally appoint the employee, as the case may be.

(b) All part-time personnel shall be appointed by the Director of Public Safety subject to confirmation by a majority of those members elected to Council. Appointments of part-time personnel shall be subject to an additional confirmation by Council after the probationary period in the same manner provided in Section 8.05 (a) above.

(c) The Fire Department shall perform all duties established by the Statutes of the State of Ohio or the Ordinances of Council.

Section 8.06 Removal

The Director of Public Safety can be removed by the Mayor if a majority of the members elected to Council approve such removal by vote at a regularly scheduled meeting of Council. The Director of Public Safety can be removed by Council by a five sixths (5/6) affirmative vote of the members elected to Council. The Director of Public Safety shall serve until removal as provided by section 8.06 hereof, or upon written resignation.

ARTICLE IX

Department of Law

Section 9.01 Appointment of the Director or Law

The Director of Law shall be the head of the Department of Law. He shall be appointed by the Mayor subject to confirmation of the majority of the members elected by Council.

Section 9.02 Duties

The Director of Law shall serve the Mayor, the Council, the administrative departments and the officers, boards, and commissions of the Municipality as legal counsel in connection with municipal affairs, and shall represent the Municipality in all proceedings in court or before any administrative board. He shall perform such other duties, consistent with his office, as may be required by this Charter, by ordinance of Council, or as directed by the Mayor.

Section 9.03 Qualifications and Term

No person shall act as the Director of Law unless he is duly admitted to practice law in the State of Ohio. Neither the Director of law nor his assistants, nor any special counsel, shall be required to reside in the Municipality.

The Director of Law or any member of the Department of Law shall serve until written resignation or removal as provided in Section 9.05 hereof.

Section 9.04 General Provisions

Council shall provide such assistants and special counsel to the Director of Law as shall, from time to time, be deemed by Council to be necessary.

Section 9.05 Removal

The Director of Law can be removed by the Mayor if a majority of the members elected to Council approve such

removal by vote at a regularly scheduled meeting of Council. The Director of Law can be removed by Council by a five-sixths (5/6) affirmative vote of the members elected to Council.

ARTICLE X

Planning and Zoning Commission

Section 10.01 Composition and Term

There is hereby created a Planning and Zoning Commission which shall consist of the Mayor, one member of Council elected by the Council annually, and three (3) electors of the Municipality, not holding other municipal office or appointment, to be appointed for staggered terms of six (6) years by the Mayor. A vacancy occurring during the term of any member shall be filled for the unexpired term in the manner authorized for an original appointment. The Commission shall choose a Secretary and such other officers as it shall deem necessary, shall make its own rules and regulations, and shall keep a journal of its proceedings. The Mayor shall serve as chairman of the Planning and Zoning Commission. The Commission shall appoint or reappoint its officers at its first regular meeting in January of each year. Members of the Commission shall serve without compensation unless otherwise provided by ordinance. The Commission shall meet at least once a month. A majority of the members of the Commission shall constitute a quorum for the transaction of business and the affirmative vote of three (3) members of the Commission shall be necessary for any official action.

Section 10.02 Powers

The Planning Commission shall be the platting authority of the municipality and have such power and perform such duties with respect to the use, subdivision, and development of land as may be prescribed by the laws of the State of Ohio or the ordinances of Council to the extent they are not inconsistent with this Charter.

Section 10.03 Amendment to Zoning

Legislation amending the Zoning Map of the City of Macedonia whereby land is rezoned from R-1 Residence District Use to any other zoning classification, shall not become effective until it is approved by a majority of the electors of the City of Macedonia voting thereon at an election to be held concurrently with the next election regularly scheduled throughout the County, provided that the election must occur more than sixty (60) days after the passage of such legislation.

Section 10.04 Removal

Any member of the Planning and Zoning Commission can be Removed by the Mayor if a majority of the members elected to Council approve such removal by vote at a regularly scheduled meeting of Council. Any member of the Planning and Zoning Commission, except the Mayor, can be removed by Council by a five-sixths (5/6) affirmative vote of the members elected to Council.

ARTICLE XI

Board of Zoning and Building Code Appeals

Section 11.01 Creation and Duties

Council shall by ordinance establish a Board of Zoning and Building Code Appeals to hear appeals for exception to and

variances from the application of ordinances, resolutions, regulations, measures, and orders of administrative officials or agencies governing zoning and building in the Municipality under procedures established by Council. Such Board shall be made up of five (5) electors of the municipality, each of whom shall serve a term (or five (5) years.

Such Board Shall have such duties and functions as may be provided by ordinance of Council of the Statutes of the State of Ohio. Members of the Board of Zoning and Building Code Appeals shall be appointed by the Mayor subject to confirmation by a majority of the members elected to Council.

The terms of the members shall be staggered so that one member's term shall expire each year. The Board shall annually elect its own Chairman and Vice Chairman, and Secretary. The minutes of the Board together with its findings and orders shall be filed in the Municipal offices.

The Board may adopt its own regulations, but the same shall not be inconsistent with the Statutes of the State of Ohio pertaining to municipal Zoning Boards or ordinances of the municipality of Macedonia.

Section 11.02 Removal

Any member of the Board of Zoning and Building Code Appeals can be removed by the Mayor if a majority of the members elected to Council approve such removal by vote at a regularly scheduled meeting of Council.

Any member of the Board of Zoning and Building Code Appeals can be removed by Council by a five-sixths (5/6) affirmative vote of the members elected to Council.

ARTICLE XII

Civil Service Commission

Section 12.01 Creation, Duties and Term

Council shall by ordinance provide for and establish a Civil Service Commission and a Civil Service System. The Commission shall consist of at least three (3) but not to exceed five (5) electors of the Municipality, not holding other municipal office or employment to be appointed by the Mayor, subject to confirmation by A majority of the members elected to Council, for terms of six (6) years each. Council shall stagger the initial terms of office of the Civil Service Commission members so that thereafter no more than one member's term shall expire in any year. A vacancy occurring during the term of any member of the Commission shall be filled for the unexpired term in the manner authorized for an original appointment. The Commission shall designate one of its members a chairman and may appoint a secretary, who need not be a member of the Commission and may hold other municipal office or employment. Council shall determine which employees of the Municipality shall be within the classified service and which shall be within the unclassified service, provided that except as qualified in Section 12.02 or 12.03 hereof, all regular full-time members of the Police and Fire Departments, including the Chief of Police and Fire Chief, shall be in the classified service, and provided further that persons, other than those serving a probationary period of employment, who have continuously employed on a full-time basis in the services of the Municipality in the same or similar position for at least ninety (90) days prior

to the date such position is placed in the classified service shall be retained in the same or similar situation without examination until discharged, reduced, disciplined, promoted, or transferred in accordance with the rules and regulations of the Commission. Upon removal or resignation of the Police Chief or Fire Chief such officer shall be entitled to return to his respective department at the next rank below Police Chief or Fire Chief.

Section 12.02 Application of Civil Service Regulations

When a Civil Service Commission has been appointed and qualified all appointments, promotions, demotions, suspensions, and discharges shall be pursuant to the Civil Service Laws of the State of Ohio and the regulations of the Civil Service Commission with respect to those positions and employees in the classified service when such laws are not inconsistent with this Charter.

Section 12.03 Miscellaneous Civil Service Provisions

(a) No regulation of the Civil Service Commission, Ordinance of Council, Statute of the State of Ohio shall disqualify by reason of age alone, a member of the Volunteer Fire Department or a part-time police officer who is serving upon the date of adoption of this Charter, from appointment as a full-time fireman or full-time police officer, if such volunteer fireman or part-time police officer serves continuously in that capacity until appointment to the position of full-time fireman or full-time police officer.

Any part-time police officer or member of the Volunteer Fire Department, who qualifies under paragraph "a" of this section shall be eligible to take the examination for the full-time positions of Chief or Police or Fire Chief as well as

the examination for any full-time officer position in the Police or Fire Departments.

Section 12.04 Removal

Any member of the Civil Service Commission can be removed by the Mayor if a majority of the members elected to Council approve such removal by vote at a regularly scheduled meeting of Council. Any member of the Civil Service commission can be removed by Council by a five-sixths (5/6) affirmative vote of the members elected to Council.

ARTICLE XIII

Parks and Recreation Commission

Section 13.01 Creation

When it seems appropriate the Council shall create, by ordinance, a Parks and Recreation Commission, consisting of six (6) electors of the Municipality not holding other municipal office and one member of Council elected by Council annually. The six (6) electors shall be appointed by the Mayor and confirmed by the majority of the members elected to Council, and shall have terms of five (5) years, beginning and ending at such a times as Council determines by ordinance or resolution. All seven (7) members of the Parks and Recreation Commission may vote.

Section 13.01.A. Powers and Duties

The Parks and Recreation Commission shall have such powers and duties as may be prescribed by ordinance of Council.

Section 13.02 Director of Parks and Recreation

Council may by ordinance provide for the creation of the position of Director of Parks and Recreation Department

and shall serve under the general supervision of the Mayor. The Director shall be appointed by the Mayor, on the advice of the Parks and Recreation Commission and subject to confirmation of the majority of the members elected to Council.

Section 13.03 Qualifications and Term

The Director of Parks and Recreation shall have knowledge of municipal park and recreation operations, budgetry, and supervision skills. The Director of Parks and Recreation shall serve until removal as provided in Section 13.06 hereof, or upon written resignation.

Section 13.04 Duties In General

The Director of Parks and Recreation under the general supervision of the Mayor and to the extent consistent with this Charter, shall be the Parks and Recreation administrator, and shall:

(a) manage, conduct, and supervise all operations of municipal parks and recreation areas.

(b) be a non-voting member of the Parks and Recreation Commission.

Section 13.05 Staff of the Parks and Recreation Department

The Parks and Recreation Department shall include such other employees as are determined necessary by the Council; said employees shall work under general supervision of the Director of Parks and Recreation Department and shall be appointed by the Mayor, with confirmation of the majority of members elected to Council.

Section 13.06 Removal of the Parks and Recreation Director.

The Director of Parks and Recreation can be removed by the Mayor, if a majority of the members elected to Council approve such removal, by vote at a regularly scheduled meeting of Council.

The Director of Parks and Recreation can be removed by Council by a three-fourths (3/4) affirmative vote of the members elected to Council.

Section 13.07 Removal of a Parks and Recreation Commission Member.

Any member of the Parks and Recreation commission can be removed by the Mayor if a majority of the members elected to Council approve such removal by vote at a regularly scheduled meeting of Council.

Any member of the Parks and Recreation Commission can be removed by council by a five-sixths (5/6) affirmative vote of the members elected to Council.

ARTICLE XIV

Municipal Engineer

Section 14.01 Appointment and Duties

The Council may by ordinance provide for the employment of a Municipal Engineer, who shall be appointed by the Mayor, subject to confirmation of the majority of the members elected to Council. The Municipal Engineer shall be a registered professional engineer in the State of Ohio and shall perform such duties as may be prescribed by the Mayor. He shall receive such compensation in the form of fees or salary, or both, as may be provided for by ordinance of Council. Neither the Engineer or any of his assistants

need be residents of the municipality. No contracts shall be executed by the Mayor for engineering services unless Authorized to do so by a majority of the members elected to Council. Council may, when it deems it appropriate, make a provision for the employment of a full-time Municipal Engineer.

Section 14.02 Removal

The Municipal Engineer can be removed by the Mayor if a majority of the members elected to Council approve such removal by vote at a regularly scheduled meeting of Council.

The Municipal Engineer can be removed by Council by a five-sixths (5/6) affirmative vote of the members elected to Council.

ARTICLE XIV.A.

Building and Zoning Inspector

Section 14.A.1. Appointment

The Council may by ordinance provide for the employment of a Chief Building and Zoning Inspector, who shall be appointed by the Mayor, subject to confirmation of a majority of the members elected to Council.

Section 14.A.2. Duties

The Chief Building and Zoning Inspector shall administer and enforce all applicable building and zoning laws, ordinances, and regulations and shall perform all other duties as Council may deem necessary.

Section 14.A.3 Removal

The Chief Building and Zoning Inspector may be removed by the Mayor if a majority of the members elected to

Council approve such removal by vote at a regularly scheduled meeting of Council.

The Chief Building and Zoning Inspector can be removed by Council by a five-sixths (5/6) vote of the members elected to Council.

ARTICLE XV

Finances and Taxation

Section 15.01 General

The laws of the State of Ohio relating generally to budgets, appropriations, deposits, expenditures, debts, bonds, and other fiscal matters of the Municipality shall be applicable to this Municipality, except when provision therefor is made in the Constitution of the State of Ohio. Separate books of account shall be maintained for each municipally-owned utility.

Section 15.02 Limitations of Rate of Taxation

The power of Council to levy taxes shall be subject to the limitations now or hereafter provided by the Constitution and the general laws of the State of Ohio, and nothing contained in this Charter shall be construed as authorizing the levy of any taxes in excess of such limitations without the vote of the people.

ARTICLE XVI

Nominations and Elections

Section 16.01 Time of Holding Elections

Regular municipal elections shall be held on the first Tuesday after the first Monday of November in each odd-numbered year commencing with the year 1971. Such other elections shall be held as may be required by law or authorized by this Charter. Any matter which, by the terms

of this Charter may be submitted to the electors at any special election also may be submitted at the time of a primary or regular election. All municipal elections shall be nonpartisan.

ARTICLE XVII

Initiative, Referendum and Recall

Section 17.01 Initiative and Referendum

Ordinances and resolutions may be proposed by initiative petition and adopted by election, and ordinances and resolutions adopted by Council shall be subject to referendum, to the extent and in the manner now or hereafter provided by the Constitution or laws of the State of Ohio, except that no zoning ordinances may be proposed by initiative unless, prior to circulation of the initiative petitions, the proposal is reviewed upon application of the Planning Commission and a public hearing is held thereon in the manner prescribed by law for all zoning amendments. Initiative and referendum petitions shall be filed with the Clerk of Council.

Section 17.02 Recall

The electors shall have the power to remove from office, by a recall election, any elected officer of the Municipality. Such power shall be exercised to the extent and in the manner now or hereafter provided by the Ohio constitution or the Statutes of the State of Ohio.

ARTICLE XVIII

Amendment of the Charter

Section 18.01 Procedure

The Charter may be amended as provided by the Ohio Constitution or the Statutes of the State of Ohio.

Section 18.02 Charter Review

Provisions shall be made by ordinance of the Council for review of the Charter by a Charter Review Commission at least once every five (5) years, beginning from and after the date of its adoption. The Charter Review Commission shall consist of one Council member, elected by Council and six (6) qualified electors of the municipality, which electors shall be appointed by Council and the Mayor. The Commission shall elect a chairperson and recording secretary.

ARTICLE XIX

General Provisions

Section 19.01 Effective Date of Charter and Transition Provisions

The Provision of the Charter shall be in effect from and after January 3, 1972.

Section 19.02 Continuance of Present Officials

All elected and appointed officers and members of boards and commissions of the Municipality holding office on December 31, 1971 shall continue in office and in the performance of their duties until provisions shall have been otherwise made in accordance with this Charter for the performance or the discontinuance of the duties of any such office. When such provisions shall have been made, the term of any such officer or member shall expire and his office be deemed abolished. The powers which are conferred and the duties which are imposed upon any officer, commission, board, or department on the Municipality under the laws of the State of Ohio, or under any ordinance or contract of the Municipality in force on

December 31, 1971 shall, if such office, commission, board, or department is abolished by the Charter, be thereafter exercised and discharged by the officer, commission, board or department upon whom are imposed corresponding functions, powers, and duties by this Charter or by any ordinance or resolution of Council thereafter enacted.

Section 19.03 Continuance of Present Employers

Every employee of the Municipality as of December 31, 1971 shall continue in such employment and thereafter shall be subject to all respects to the provisions of this Charter.

Section 19.04 Effect of Charter on Existing Laws and Rights

The adoption of this Charter shall not affect any pre-existing rights of the Municipality, nor any right or liability or pending suit or prosecution, either on behalf of or against the Municipality or any officer thereof, nor any franchise granted by the Municipality, nor pending proceedings for the authorization of public improvements or the levy of assessments thereof. Except as a contrary intent appears herein, all acts of the Council of the Municipality including all of its legislation, whether passed prior to or subsequent to the adoption of this Charter, shall continue in effect until lawfully amended or repealed.

Section 19.05 Salaries, Compensation and Bonds

The Council shall have the power to fix the salaries of its members and of all other officers and employees of the Municipality, whether elected or appointed, and to establish such bonds as in the opinion of the council are necessary

for the faithful discharge of their duties. The premium of any bond required by the Council shall be paid by the Municipality. The salary of an elected officer shall not be increased after his election nor during his term of office, nor decreased after his election or during such term except with the consent of the officer involved. The council may authorize the payment to any officer or employee for travel for any municipal purpose including the training and/or development of such officer or employee with regard to his assigned duties.

Section 19.06 Conflict of Interest

No member of Council or any officer, member of a Board or a Commission or employee or a Municipality shall have any financial interest, direct or indirect, in any contract with or sale to the Municipality or any materials, supplies, or services, or any land or interest in land. Any such person violating the provisions hereof shall forfeit his office and any such contract shall be voidable at the option of the Council.

Section 19.07 Effect of Partial Invalidity

A determination that any part of this Chapter is invalid shall be invalidate or impair the force or effect of any other part thereof, except to the extent that such other part is wholly dependent for its operation upon the part declared invalid.

Section 19.08 Interpretation

The article and section headings herein have been inserted for convenience in reference and are not intended to define or limit the scope of, or otherwise affect any provision of this Charter.

Whenever this Charter requires the affirmative vote of a stated fraction of the Council, the multiplicand shall be reduced by the number of vacancies then existing in the Council.

The period of residence in the Municipality requited by this Charter as a qualification for elective office shall include the period of residence in any territory which has been annexed to the Municipality.

STATE OF OHIO)
) SS: **AFFIDAVIT**
COUNTY OF SUMMIT)

Joseph Migliorini, having been first duly sworn, deposes and states:

1. That he has personal knowledge of the facts contained herein as qualified herein.

2. That he is Mayor of the City of Macedonia.

3. That he is past President of the Summit County Mayor's Association and Legislative Chairman.

4. That he, with the advice of legal counsel and a magistrate, preside over the Mayor's Court of the City of Macedonia and such has been true for more than the last four years.

5. That he is the Supervisor of the Finance Director pursuant to City Charter, but he has no day to day involvement with the administration of the finances of the City of Macedonia.

6. That he is the Supervisor of the Chief of Police pursuant to City Charter, but has no day to day involvement with the administration of the police department of the City of Macedonia. In accordance with Codified Ordinance 151.01(a) the Chief of Police is in "immediate charge of the police department."

7. That the revenue generated by the Mayor's Court is minuscule in relation to the general fund of the city. A typical example is the year 1995 in which total of revenue of $176,244.57 was generated by the Mayor's Court before

consideration of the costs of operation of such Court and the general fund was $4,049,080.07.

8. In 1996, Mayor's Court revenue, before considering operation costs, was $170,304.05 and the general fund was $4,076,565.51.

9. In both 1995 and 1996, Mayor's Court revenue before costs of operation was approximately 4%.

10. The revenue of the Mayor's Court includes such sums as are generated in both contested and non-contested cases and cases handled by both affiant as mayor and, as of 1995, the magistrate for the Mayor's Court.

11. Salary for the Mayor is fixed by City Council and is not related to Mayor's Court revenue.

12. Attached hereto as Exhibits A-1, A-2 and A-3 are fair and accurate copies of portions of the Codified Ordinances of the City of Macedonia, The Charter of the City of Macedonia and the Civil Service rules and Regulations of the City of Macedonia, respectively. These documents were in effect during the pendency of Mr. DePiero's case in Macedonia Mayors Court.

13. Although under Charter, Affiant has certain powers of appointing city employees to their positions, such powers are often restricted. Police officers are classified employees for Civil Service purposes. Affiant may only appoint such persons as are presented to him by the Civil Service Commission. Any such appointments must also be confirmed by City Council.

14. At all times in my handling of the Depiero case in Macedonia Mayors Court, I acted in my official capacity as a Judge of such Court and, in good faith, believed that my

actions were within the powers conferred upon me by state statute and the Charter of the City of Macedonia and in accord with the laws of the State of Ohio and The United States of America.

FURTHER AFFIANT SAYETH NAUGHT.

/S/ Joseph Migliorini
JOSEPH MIGLIORINI

SWORN TO BEFORE ME and subscribed in my presence this 16th day of September, 1997.

/S/ John G. Peto
NOTARY PUBLIC
John G. Peto, Atty
Notary Public State of Ohio
My comm. has no expir. date
Section 147.03 R.C.

EXHIBIT C

STATE OF OHIO)
) SS: **AFFIDAVIT**
COUNTY OF SUMMIT)

Tom DiLellio, having been first duly sworn, deposes and states:

1. That he has personal knowledge of the facts contained herein as qualified herein.

2. That he is and has been the Finance Director of the City Macedonia, Ohio since September, 1988 and he has a degree in accounting.

3. That he has access to those records maintained in the ordinary course of business of the City of Macedonia and has utilized such financial documents in setting forth those figures set forth herein.

4. That the following chart, attached hereto as Exhibit C-1 fairly and accurately sets forth for the years 1993, 1994 and 1995, respectively, total revenue receipts for the general fund, fines imposed by the Mayor's Court, court costs assessed in the Mayor's Court, and such other figures identified and explained in Exhibit C-1.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Tom Dilellio
TOM DILELLIO

SWORN TO BEFORE ME and subscribed in my presence this 16th day of September, 1997.

/s/ John G. Peto
NOTARY PUBLIC
John G. Peto, Atty
Notary Public State of Ohio
My comm. has no expir. date
Section 147.03 R.C.

	Fiscal Year 1993	Fiscal Year 1994	Fiscal Year 1995
General Fund Revenue	3,178,291	3,533,391	4,049,080
All Non-General Fund Revenues	1,893,623	2,447,615	2,755,217
Revenue All Funds	**5,071,914**	**5,981,006**	**6,804,297**
Mayor's Court fines Assessed[26]	132,239	120,772	139,027
Court Costs Assessed	34,071	26,843	37,218
Mayor's Court Revenues	**166,310**	**147,615**	**176,245**
Mayor's Court Expenses[27]	62,053	71,679	72,835
Net Mayor's Court Revenue after certain expenses[28]	**104,257**	**75,936**	**103,410**

[26] This figure includes certain fines collected by the Municipal Court and transferred to the City.

[27] Includes certain operational costs attributable to Mayor's Court such as personnel costs for Prosecutor and Clerk, such expenses are not all inclusive of cost incurred by City in operating Mayor's Court.

[28] This figure does not reflect deductions for certain additional expenses incurred by the City and associated with Mayor's Court such as wages for police officers, for Court security and for Court appearances.

UNITED STATES CURT OF APPEALS FOR THE SIXTH CIRCUIT

1997 U.S. App. LEXIS 10098

May 1, 1997, FILED

MICHAEL A. MICALE,	)	**No. 98-3284**
KATHY A. STRACH,	)	
Plaintiffs-Appellants,	)	**NOTICE**
v.	)	
THE VILLAGE OF BOSTON	)	
HEIGHTS, RAYMOND McFALL,	)	
Defendants-Appellees.	)	

[*11 NOT RECOMMENDED FOR FULL-TEXT PUBLICATION, SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF TIES DECISION IS REPRODUCED.

SUBSEQUENT HISTORY:

Reported in Table Case Format at: 113 EM 1235, 1997 *U.S. App. LEXIS* 17564

PRIOR HISTORY:

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF 01410.91-W893. Oliver. 2-1-95

DISPOSITION: AFFIRMED.

COUNSEL: For MICHAEL A. MICALE, individually and on behalf of all others similarly situated, Plaintiff-Appellant: Melissa Graham-Hurd, Akron, OH. Augustin F. O'Neil, Akron, OH. For KATHY A. STRACH, individually and on behalf of all others similarly situated, Plaintiff-Appellant: Melissa Graham-Hurd, (See above). Augustin F, O'Neil, (See above). For THE VILLAGE OF BOSTON HEIGHTS, Defendant - Appellee: Walter R. Matchinga, Jeffrey A. Schenk, Quandt, Giffels & Buck, Cleveland, OH. Gene McKenna, McKenna & Modugno, Akron, OH. For RAYMOND MCFALL, in his official capacity as Judge of the Village of Boston Heights Mayor's Court, Defendant-Appellee: Walter R. Matchinga, (See above). Gene McKenna, (See above).

JUDGES:

BEFORE: CONTIE, SUHRHEINRICH, [*2] and COLE, Circuit Judges.

OPINION:

PER CURIAM. Plaintiffs-Appellants, Michael A. Micale and Kathy A. Strach, appeal the district court's grant of summary judgment in favor of Defendants-Appellees, the Village of Boston Heights, Ohio, and Mayor Raymond McFall, in his official capacity as judge of the Boston Heights Mayor's Court, in this civil rights suit brought under 42 U.S.C. § 1983. Appellants allege due process violations stemming from their pleas entered before the mayor's court, and seek injunctive and declaratory relief. For the reasons stated below, we AFFIRM the district court's grant of summary judgment.

I. Michael A. Micale was issued a uniform citation and summons on April 28, 1989 in the Village of Boston Heights, charging him with speeding under Boston Heights Codified Ordinance § 333.03(B)(4). The offense was a misdemeanor with no potential penalty of imprisonment. Pursuant to the summons, Micale appeared in the mayor's court on May 9, 1989 before Mayor Raymond McFall, in his official capacity as presiding judge. The mayor was the financial and administrative officer of the village. Micale entered a no contest plea to the offense charged. Subsequently, [*3] the mayor entered a finding of guilt and imposed a fine and court costs against Micale. Micale paid the fine and costs, and did not pursue an appeal.

Kathy A. Strach was issued a uniform citation and summons on December 3, 1987 in Boston Heights, charging her with speeding and driving with expired license plates under Boston Heights Codified Ordinances §§ 333.03(B)(5) and 335.09. The offenses were misdemeanors with no potential penalty of imprisonment. Pursuant to Ohio Traffic Rules 12 and 13, Strach waived her right to an appearance before the mayor's court, entered a guilty plea by signature on the reverse side of her summons, and remitted the fine and court costs by mail to the Village of Boston Heights Violations Bureau.

On May 8, 1991, Micale and Strach brought suit in the United States District Court for the Northern District of Ohio against Boston Heights and the mayor, alleging due process violations stemming from their pleas entered in the mayor's court. On January 31, 1995, the district court adopted the recommendation of the magistrate judge, and

granted summary judgment in favor of defendants. On March 2, 1995, plaintiffs timely filed a notice of appeal.

Plaintiffs challenge [*4] the district court's ruling on three grounds, arguing that: (1) in Ohio, the appropriate statute of limitations governing § 1983 claims is the four-year statute of limitations for residual tort claims, rather than the two-year statute of limitations for claims of bodily injury; (2) the provisions of the Ohio Revised Code and the Ohio Traffic Rules that authorize mayor's courts to take no contest pleas violate the due process requirements of the Fourteenth Amendment; and, (3) Ohio's Criminal Rules violate the due process requirements of the Fourteenth Amendment by failing to require a mayor's court judge to inform defendants of their right to appeal.

II. This court conducts a de novo review of a district court's grant of summary judgment. *Harrow Prods., Inc. v. Liberty Mut. Ins. Co., 64 E3d 1015 (6th Cir* 1995). Federal Rule of Civil Procedure 56(c) permits summary judgment if the record shows "that the moving party is entitled to judgment as a matter of law. " Id. We assess the record in the light most favorable to the non-movants, drawing all reasonable inferences in their favor. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U S. 574, 587, 89 L. Ed. 2d* 538, [*5] 106 *S. Ct. 1348 (1986).*

III. Strach argues that the district court applied the wrong statute of limitations, incorrectly barring her § 1983 claim. We disagree. The United States Supreme Court has held that the statute of limitations for personal-injury claims of the state in which the cause of action arose applies to claims arising under § 1983, even though § 1983

is a federal claim. *Wilson v. Garcia, 471 U. S. 261, 280, 85 L. Ed. 2d 254,* 105 S. Ct. 1938 *(1985).* Moreover, "where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions." *Owens v. Okure, 488 U S. 235, 249-50, 102 L. Ed. 2d 594, 109 S. Q. 573 (1989).* The Owens Court noted, however, that "courts should resort to residual statutes of limitations only where state law provides multiple statutes of limitations for personal injury actions and the residual one embraces, either explicitly or by judicial construction, unspecified personal-injury actions." Id. *at 250 n. 12.* Strach argues that the applicable statute is Ohio's residual statute embracing unspecified [*6] personal injury actions, Ohio Rev. Code § 2305.09(D), which provides a four-year statute of limitations. Strach therefore contends that the district court erred in applying Ohio Rev. Code § 2305. 10, which applies to claims of bodily injury, and sets forth a two-year statute of limitations.

In support of her argument, Strach relies on Ohio court decisions that hold that § 2305.09(D), Ohio's residual statute of limitations, is the appropriate statute of limitations in § 1983 cases. See, e.g., *Bojac Corp. v Kutevac, 64 Ohio App. 3d 368, 581 N.E.2d 625 (Ohio* App. 1990) (Observing that a "claim under § 1983 does not fit into any of the categories of Ohio Rev. Code §§ 2305. 10 through 2305.12. It must, therefore, fall within the general or residual statute for personal injury actions, which is Ohio Rev. Code § 2305.09 (D)." 581 *N.E. 2d at 630.); Weethee*

v. Boso, 64 Ohio App. 3d 532, 582 N. E. 2d 19 (Ohio App. 1989) (holding that § 2305.09(D) is the appropriate statute of limitations for § 1983 cases).

If this court had not addressed this specific issue, the Ohio cases cited by Strach may be persuasive. However, this court, sitting en banc, has definitively held that pursuant [*7] to Owens, Ohio Rev. Code § 2305.10 is the controlling statute of limitations for § 1983 claims arising in Ohio. *Browning v. Pendleton 869 E2d 989, 992 (6th Cir 1989).* In Browning, this court considered whether Ohio Rev. Code § 2305.11 (providing a one year statute of limitations for intentional torts) or Ohio Rev. Code § 2305.10 (providing a two-year statute of limitations for claims of bodily injury) was the appropriate statute of limitations for § 1983 actions. Id. at 990. Thus, although the Browning court did not address Ohio Rev. Code § 2305.09(D), the precedent in this circuit is that Ohio Rev. Code § 2305. 10 is the appropriate statute of limitations in § 1983 cases. We are bound to follow this precedent, as have other panels of this circuit. See, e. g., *LRL Properties v. Portage Metro Housing Authority, 55 E 3d 1097, 1104 (6th Cir.* 1995); *Kurinsky v. United States, 33 E3d 594 (6th Cir* 1994). It is well established that "unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this court sitting en banc overrules the prior decision," the prior decision of a panel, much less the circuit sitting [*8] en banc, remains controlling au 1997 U.S. App. LFXIS 10098, *8 Authority. Salmi *v. Secretayy of Health & Human Servs., 774 E2d 685, 689 (6th Cir. 1985).* Accordingly, we apply Ohio Rev.

Code § 2305.10's two-year statute of limitations as required by Browning, and find Strach's claim is barred because it was brought two years after her cause of action arose. We thus affirm the district court on this issue.

IV. The next issue we address is Micale's argument that the district court erred in finding that the taking of a no contest plea by the mayor, as set out in Ohio Traffic Rule 9 and Ohio Rev. Code § 2937.07, did not violate Micale's due process rights under the Fourteenth Amendment. Micale argues that a no contest plea is not a ministerial function that can be carried out by a mayor acting in both an executive and judicial function. We disagree.

Mayor's courts in Ohio are a statutorily created judicial branch. Setting forth the jurisdiction of mayor's courts, the Ohio Revised Code provides, in relevant part, that:

> In all municipal corporations not being the site of a municipal court ... the mayor of the municipal corporation has jurisdiction ... to hear and determine all criminal cases [*9] involving any moving traffic violation occurring on a state highway located within the boundaries of the municipal corporation.

Ohio Rev. Code § 1905.01(A). The procedural aspects of mayor's courts hearing traffic violations are set forth in the Ohio Traffic Rules. Rule 9 provides, in pertinent part, that: Where in a mayor's court, a defendant is entitled to a jury trial and a jury demand is made ... the mayor shall transfer the case. ...If a jury demand is not made ... and the defendant waives his right to jury trial in writing, a mayor may try the case if (1) his compensation as a judge is not

directly dependent upon criminal case convictions, or (2) he is not the chief executive and administrative officer of the municipality and as such responsible for the financial condition of the municipality. Guilty and no contest pleas may be taken by any mayor, including mayors whose compensation as a judge is directly dependent upon criminal case convictions and mayors who as chief executive and administrative officer of the municipality are responsible for the financial condition of the municipality. Ohio Traf. R. 9(B).

The United States Supreme Court [*10] has addressed the issue of the constitutionality of a mayor possessing both executive and judicial powers. *Ward v. Village of Monroeville, 409 US. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972).* In Ward, the Court held that due process was violated when an individual was compelled to stand trial for traffic offenses before the local mayor, who had a pecuniary interest in the outcome of the case. *409 US. at 61-62.* Noting that the mayor had wide executive powers, and that a "major part of the village income is derived from the fines, forfeitures, costs, and fees imposed by him in his mayor's court," *id. at 58,* the Court stated that the issue before it was "whether the mayor can be regarded as, an impartial judicial officer under the principles laid down. . . in *Tumey v. Ohio, 273 US. 510, 71 L. Ed. 749, 47S.* Ct. *437 (1927).* " n1 Ward, *409 U.S. at 59.*

In Tumey, the Court held that it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has

a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.

Tumey, 273 U.S. at 523. [*11]

However, the Court explicitly limited its holding in Ward to the facts of that case, stating:

> The question presented on this record is the constitutionality of the Mayor's participation in the adjudication and punishment of a defendant in a litigated case where the elects to contest the charges against him. We intimate no view that it would be unconstitutional to permit a mayor or similar official to serve in essentially a ministerial capacity in a traffic or ordinance violation case to accept a free and voluntary plea of guilty or nolo contendere, a forfeiture of collateral, or the like.

409 US. at 62 n. 2 (emphasis added).

With this background in mind, we turn to Micale's arguments. Micale argues that the taking of a plea of no contest is not a ministerial function, but instead, is a discretionary function that entails a determination of guilt. Micale therefore contends, pursuant to Ward, that a plea of no contest is entitled to the same procedural safeguards as a litigated matter.

Under Ohio law, a plea of no contest is not an admission of guilt, but is an admission of the truth of the facts alleged in the complaint. Ohio R. Crim. R II(B)(6); Ohio [*12] Traf. R. 10(B)(2). Further, pursuant to Ohio law, courts must conduct the following inquiry before accepting a no contest plea:

> If the plea be "no contest" ... in pleading to a misdemeanor, it shall constitute a stipulation that the judge ... may make a finding of guilty or not guilty from the explanation of the circumstances, and if *guilt be found, impose* or continue for sentence accordingly.

Ohio Rev. Code § 2937.07. Micale therefore contends that the mayor cannot act as a "neutral and detached" judge because the mayor - who, also is responsible for law enforcement and the financial condition of Boston Heights - ultimately determines a defendant's guilt after a no contest plea.

We disagree. The fact that the mayor makes a finding of guilty or not guilty after an explanation of the circumstances of the case does not elevate the taking of a no contest plea to the level of an adjudication of guilt after a not guilty plea, in which a defendant is contesting the charges brought against him. In a no contest plea, a defendant admits the truth of the facts alleged in the complaint; the mayor then can refuse to accept the plea by determining that the uncontested facts [*13] do not rise to the level of a violation of the law. This procedure simply does not require the same safeguards as the complete discretion involved in an adjudication of a plea of not guilty, in which the facts alleged in the complaint are very likely in dispute.

Thus, Chapter 1905 of the Ohio Revised Code and Ohio Traffic Rule 9 fully comply with the dictates of Ward: a defendant who contests the charges against him is entitled to adjudication by a judge who does not have a pecuniary

interest in the case" A guilty plea or a no contest plea, on the other hand, are ministerial functions which a mayor - even one with a pecuniary interest -may carry out. We therefore decline to extend the holding of Ward that is applicable to not guilty pleas to encompass no contest pleas. We find that the mayor acted in a ministerial role when taking Micale's plea of no contest. Micale's due process rights were not violated; accordingly, defendants are entitled to summary judgment as to this issue.

V. The final issue we address is Micale's claim that the district court erred in finding that the mayor's failure to apprise him of his right to a de novo trial before a judge licensed to [*14] practice law, following Micale's no contest plea, did not violate due process.

The Ohio Traffic Rules establish the procedure for the taking of pleas in mayor's courts. Mirroring the pertinent part of the Ohio Rules of Criminal Procedure, Ohio Traffic Rules provide that "when a plea of guilty or no contest is accepted pursuant to this rule, the court shall proceed with sentencing under Criminal Rule 32. Ohio Traf. R. 10(B)(3); see also Ohio R. Crim. P.11(B). In proceeding with sentencing, Criminal Rule 32 provides, in pertinent part, that:

> (2) Notification of Right to Appeal.
>
> After imposing sentence, in a serious offense which has gone to trial on a plea of not guilty, the court shall advise the defendant that: (a) he has a right to an appeal; ... (e) he has a right to have notice of appeal timely filed on his behalf.

Ohio R. Crim. P. 32 (A)(2) (emphasis added). n2 Thus, Criminal Rule 32 does not provide for notification of the right to appeal in cases that have not gone to trial or in petty offenses.

> n2 The Ohio Rules of Criminal Procedure define a "serious offense" as "any felony, any misdemeanor for which the penalty prescribed by law includes confinement for more than six months, " Ohio R. Crim. P. 2(C), and define a "petty offense" as "a misdemeanor other than a serious offense. " Ohio R. Crim. R 2(D).

[*15]

The appeals procedure from a mayor's court judgment is set out in Ohio Revised Code §§ 1905.22 through 1905-25, which provides that an appeal may be taken to the local municipal or county court for a trial de novo upon notice being filed within ten days of judgment. A municipal court does not have jurisdiction over the appeal from a mayor's court when the appeal was not timely. *Fairlawn v. Forney, 82 Ohio App. 3d 47, 610 N.E.2d 1193 (Ohio App. 1992).* In addition, the Ohio Supreme Court has held that the payment of a fine and court costs in a criminal case, when the defendant suffers no collateral disability, renders the conviction moot and precludes attack on the conviction or sentence. *State v. Wilson, 41 Ohio St. 2d 236, 325 N.E.2d 236 (Ohio* 1975). Thus, defendants appearing before a mayor's court can exercise their right to a trial de novo only if they timely file a notice of appeal and decline to pay their fines and court costs. Micale attacks the constitutionality of this system. In general, however, there

is no constitutional right to an appeal, *Abney v. United States, 431 U.S. 651, 656, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977)* (citation omitted), nor is there a constitutional [*16] requirement that a court inform a defendant of a right to appeal following a plea of guilty or nolo contendere. See Fed. R. Crim. P, 32(a); Ohio R. Crim. P. 32(A); *Carey v. Leverette, 605 F.2d 745 (4th Cir 1979); United States v. Drummond, 903 F.2d 1171, 1173 (8th Cir 1990).* In support of his argument to the contrary, Micale relies primarily on the following dicta from *North v. Russell, 427 US. 328, 335, 49 L. Ed. 2d 534, 96 S. Ct. 2709 (1976):*

We also assume that police court judges in Kentucky recognize their obligation to inform all convicted defendants, including those who waived counsel or for whom imprisonment was not imposed, of their unconditional right to a trial de novo……

Id. Thus, Micale asserts that in order for his appearance before a lay judge to comply with due process, the judge was required to provide notice to Micale of his right to an appeal de novo.

However, as the district court found, the Kentucky system at issue in North is distinguishable from the Ohio system at issue in the present case. The exception to the general rule that was created in North was based on the right to appear before a judge who is licensed [*17] to practice law. This additional protection was necessary because in Kentucky police court, a defendant must either go to trial before a lay judge or plead guilty in order to get a trial in a Kentucky circuit court. Id. Thus, a defendant in Kentucky police court was unlikely to know of his right to

a trial before a judge licensed to practice law if he desired to contest the charges. This is entirely different from the Ohio system which allows a defendant to plead not guilty, thereby transferring his case at the outset to a municipal court for a trial before a judge licensed to practice law. The additional safeguards that are necessary in the Kentucky police court system are therefore not necessary in Ohio's mayor's courts.

In conclusion, we find that Ohio law, which does not mandate that a defendant who pleads guilty or no contest be informed of his right to appeal, passes constitutional muster. Ohio law provided Micale with a right to an appeal consisting of a trial de novo, pursuant to Ohio Rev. Code § 1905.22 et seq. Micale waived that right when he paid his fine and when he failed to file notice of an appeal within ten days of the judgment. Accordingly, we affirm the district [*18] court's decision in this regard.

VI. For the foregoing reasons, we hereby AFFIRM the district court's grant of summary judgment in favor of defendants.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL A. MICALE, et al.,	)	CASE NO.: 5:91CV0893
	)	
Plaintiff,	)	JUDGE SOLOMON
	)	OLIVER, JR.
vs.	)	
	)	MEMORANDUM AND
VILLAGE OF BOSTON	)	ORDER
HEIGHTS, et al.,	)	
	)	

U.S. Dist Ct.
Filed 1/31/95

Defendants.

This memorandum and order addresses Magistrates Judge James S. Gallas' Report and Recommendation wherein he recommended that this court grant Defendants' motion for summary judgment and deny Plaintiffs' motion for' summary judgment. For the reasons set forth below.

I

In their complaint brought under 42 U.S.C. § 1983 for violation of civil rights, Plaintiffs seek declaratory and injunctive relief and restitution on behalf of individuals who are denied due process when found guilty of criminal offenses in the Mayor's Court of the Village of Boston Heights, Ohio, and were not informed of their right to trial *de novo* before the Municipal Court of Cuyahoga Falls, Ohio, and the necessity that notice of appeal be filed within ten days pursuant to O.R.C. § 1905.23. Plaintiffs further seek to invalidate prior proceedings in the mayor's court on

the grounds that it denies due process and equal protection due to the lack of an impartial hearing officer. The Defendants are the Village of Boston Heights and Raymond McFall, in his official capacity as judge of the Village mayor's court. This case has been submitted by all parties on motion for summary judgment. The Magistrate Judge found that all parties agree that there are no material factual issues in dispute. *See* Magistrate Report and Recommendation, at 2.

II.

Plaintiff, Michael A. Micale, was issued a traffic citation on April 28, 1989, for a violation of the Village of Boston Heights Codified Ordinance § 333.03 (B) (4) applying to speeding. The offense was a minor misdemeanor -with no potential penalty of imprisonment. Pursuant to the traffic citation and summons, Micale appeared in the Village of Boston Heights Mayor's Court before Defendant, Raymond McFall, on May 9, .1989, at which time he voluntarily entered -a plea of "no contest" to the speeding violation. Subsequently, McFall entered a finding of guilty and imposed a fine and court costs against Micale. Micale then paid his fine and costs. At no time did Micale seek to appeal his adverse decision nor did he seek to have his plea of no contest vacated.

Plaintiff, Kathy A. Strach, was issued uniform traffic citations on December 3, 1987, for violation of the Village of Boston Heights Codified Ordinance §§ 333.03 (B) (5) and 335.09 applying to speeding and expired license plates. The offenses were minor misdemeanors with no potential penalty of imprisonment. Pursuant to the Ohio

Traffic Rules, Strach, voluntarily waived her appearance in the Village of Boston Heights Mayor's Court by entering a plea of guilty by signature on the reverse side of the citation and remitting the fine and court costs by mail to the Village of Boston Heights Violations Bureau. The Bureau received her remittance on December 16, 1987. At no time did Strach seek to have her plea of guilty vacated or withdrawn by the Village of Boston Heights Mayor's Court or any other court.

Plaintiffs object to several parts of the Magistrate's Report and Recommendation. Specifically, Plaintiffs object to the Magistrate's recommendations regarding the statute of limitations, municipal liability, deprivation of due process through lack of disinterested and impartial judge and denial of due process due to mayor's failure to notify of appeal right. The court addresses each in turn.

III.

The Magistrate found that the applicable statute of limitations in. Ohio is two years for Section 1983 actions. *See* Magistrate Report and Recommendation, at 6 *(citing Browning v. Pendleton,* **869 F.2d 989 (6th Cir. 1989)).** Plaintiffs argue that the statute of limitations ought to. be four years under O.R.C. §2305.09 (D). The Sixth Circuit rejected this argument in the recent case of *Kurinsky v. United States* of *America,* 33 F.3d 594 (6th Cir. 1994). Consequently, the statute of limitations in Ohio is still two years for actions brought under Section 1983. Plaintiff Strach brought her action over three years after the cause of

action had accrued; thus the court finds that the statute of limitations bars Plaintiff Strach's claim.[29]

IV.

Next, Plaintiff challenges the Magistrate's finding regarding municipal liability. The court declines to address this issue due to mootness because it finds that Plaintiff fails to state a constitutional violation.

V.

Plaintiff claims that his due process rights were violated through lack of a disinterested and impartial judge. The Magistrate recommended against this claim upon his finding that following a plea of "no contest" in. Ohio, "a Mayor-Judge is performing a permissible service in an 'essentially ministerial capacity'." *See* Magistrate Report and Recommendation, at 19. Plaintiff claims error because the function of accepting a "no contest" plea is not merely a ministerial act, but instead, involves the exercise of discretion as to adjudication and sentence.

Before addressing Plaintiff's due process claims, the court notes that to allege a procedural due process violation under Section 1983, Plaintiff must demonstrate the following: (1) that he is deprived of property as a result of an established state procedure that itself violates due process rights; or (2) by proving that the defendants deprived him of property pursuant to a 'random and unauthorized act' *and* that available state remedies would not adequately compensate for the loss." *Macene v. MJW, Inc.*, 951 F.2d 100, 706 (6th Cir. 1991) (citations omitted).

---

[29] As Plaintiff Strach's claim is time barred, the court addresses Plaintiffs' other objections with regard to Plaintiff Micale only.

Plaintiff does not claim that Mayor McFall committed a random and unauthorized act. Instead, he claims that the state procedure itself violates the due process clause by allowing a partial and interested judge to adjudicate his case.

Plaintiff, however, admits that he did not pursue an appeal to the municipal court. This automatic appeal as of right entitles Plaintiff to a trial *de novo* in the municipal court. This two-tier process is designed to safeguard a plaintiff's due process rights. Consequently, by not pursuing the process the state affords, Plaintiff cannot now challenge that process as unconstitutional.

Yet, the Plaintiff cites *Ward v. Village of Monroeville,* 409 U.S. 57 (1972), for the proposition that the possible correction of any unfairness at trial by utilization of the procedural safeguard of an appeal and trial *de novo is* constitutionally insufficient. This court agrees with and adopts the reasoning of the Magistrate that the taking of guilty and no contest pleas is ministerial in nature and therefore caused no unfairness to Plaintiff. In *Ward,* the Supreme Court explicitly stated that "we intimate no view that it would be unconstitutional to permit a mayor or similar official to serve in essentially a ministerial capacity in a traffic or ordinance violation case to accept a free and voluntary plea of guilty or nolo contendere, a forfeiture of collateral, or the like." *Ward,* 409 U.S. at 62 n.2. Since the Supreme Court has not declared the performance of ministerial acts unconstitutional, that Defendant McFall. engaged in a ministerial act, in accepting Plaintiff's plea, raises no constitutional error.

VI.

Plaintiff also fails to state a constitutional error in challenging 0. R. C. § 1905.24. The statute states that "upon the filing of a notice of appeal, the clerk of the mayor's court shall make a certified transcript of the proceedings and deliver such transcript together with the original papers used on the trial, to the court to which the appeal is taken. . . ." Plaintiff alleges the statute is constitutionally deficient in that it does not also provide for a transcript of the evidence "that the appellate court could use to review the sufficiency of the inquiry into the factual basis following a 'no contest' plea." *See* Objections of Plaintiffs Micale and Strach to the Magistrate Judge's Report and Recommendation, at 13.

The court finds no arguable basis in law for this claim. Plaintiff cites no authority for the proposition that the state must provide a transcript of the evidence presented in the Mayor's Court in addition to a certified transcript of the proceedings. Furthermore, the appeal is to a municipal court for a trial *de novo. A de novo* trial is defined as "[t]rying the matter anew; the same as if it had not been heard before and as if no decision had been previously rendered." Black's Law Dictionary (6th Ed. 1990). Given this definition, it is not clear to this court what harm Plaintiff suffers by not having a transcript of the evidence presented. As a result, this court finds that, to the extent that Ohio law provides a certified transcript of the proceedings, it is constitutionally sufficient.

VII.

Finally, Plaintiff asserts, that he, was entitled to notice regarding his right to appeal and the ten day time frame in which to do so. Plaintiff relies, on the following passage from the United States Supreme Court addressing a two-tier court system in Kentucky:

> We also assume that police court judges in Kentucky recognize their obligation td inform all convicted defendants, including those who waived counsel or for whom imprisonment was not imposed, of their unconditional right to a trial de novo and of the necessity that an "appeal" be filed within 30 days in order to implement that right. Ky. Rule Crim. Proc. 12.04.

North v. Russell, 427 U.S. 328, 335 (1976).

As the Magistrate Judge found, however, there are significant differences between the Kentucky two-tier system and the Ohio two-tier system. First, the Kentucky system requires those who appear in police court to either go to trial before a lay judge or plead guilty to the offense. The defendant must do one or the other in order to get a trial de novo in a Kentucky circuit court. Moreover, in Kentucky, the plaintiff in *North* faced a fine of $ 100 to 500 and not more than six months in jail. The plaintiff in *North* in fact received $150 fine and 30 days in jail. Consequently, given the combination of the requirement that one plead guilty or go to trial in the police court and the seriousness of the penalties imposed, the Supreme Court recognized the appropriateness of the Kentucky procedure providing for notice regarding an appeal for a

trial *de novo so* that those appearing in police courts could protect their liberty and property interests.

By contrast the Ohio system provides defendants with an opportunity to plead not guilty and such a plea results in the transfer of the case to a municipal court for a trial *de novo* before an attorney-judge. Furthermore, the Mayor Courts typically adjudicate minor misdemeanors for which no jail time is imposed. Rule 32 (A) (2) of the Ohio Rules of Criminal Procedure requires the court to advise the defendant-of his right to appeal "after imposing a sentence in a serious offense, which has gone to trial." Consequently, the court finds no constitutional infirmity with the Ohio appeals process from. Mayor Courts or the action taken by the Mayor-Judge in Plaintiff's case; as Plaintiff had the opportunity to plead not guilty and pursue a trial de novo in municipal court and was not charged with a "serious offense."

VIII

For the foregoing reasons, the court adopts the Report and Recommendation of the Magistrate Judge granting summary judgment to the Defendants, denying summary judgment to the Plaintiffs and dismissing Plaintiffs' case.

IT IS SO ORDERED.

/s/ Solomon Oliver
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL A. MICALE, et al.,	)	CASE NO.: 5:91CV0893
	)	
	)	JUDGE SOLOMON
Plaintiff,	)	OLIVER, JR.
	)	
vs.	)	**JUDGMENT ENTRY**
	)	
VILLAGE OF BOSTON HEIGHTS, et al.,	)	U.S. Dist Ct. Filed 1/31/95

Defendants.

This court, by order, having adopted the Report and Recommendation of the Magistrate hereby grants Defendants' motion for summary judgment, denies Plaintiffs' mot ion for summary judgment and dismisses Plaintiffs' case.

IT IS SO ORDERED.

/s/ Solomon Oliver
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA, Plaintiff,
v. JEFFREY R. GOBEY, Defendant.
Criminal Action No. 92 CR 93
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
1992 U.S. Dist. LEXIS 22060
September 12, 1992, Decided
September 12, 1992, Filed

JUDGES: [*1] NOTTINGHAM OPINION BY THE COURT, EDWARD W. NOTTINGHAM OPINION: ORDER AND MEMORANDUM OF DECISION

Defendant Jeffrey Robert Gobey has been indicted for possession of methamphetamine, with intent to distribute it, and possession of a semi-automatic handgun in connection with a drug trafficking offense. Since he is a convicted felon, the Government also indicted him for illegal possession of this same handgun and a quantity of ammunition. The indictment arose out of certain events which occurred on February 18, 1992. On that day, Vice President Quayle was scheduled to arrive at Stapleton International Airport for a speech at the state capitol. Coincidentally, defendant checked into a hotel adjacent to the airport. Security personnel at the hotel alerted Denver police when defendant's activities aroused their suspicions. Police investigation, undertaken before the police made contact with defendant, disclosed that there was an outstanding warrant for defendant's arrest on a misdemeanor weapons charge and that defendant should be considered armed and dangerous.

Police and a secret service agent thereafter arrested defendant in his hotel room. During a subsequent search,

they seized approximately three [*2] pounds of methamphetamine, a large amount of currency, a gun, and a gun clip from the hotel room. Defendant claims that his arrest was illegal and that the search of his bags and seizure of these items violated his rights under the Fourth Amendment to the United States Constitution.

The matter is now before the court on defendant's motion to suppress evidence gathered during the search of defendant's hotel room on February 18, 1992. The court held a suppression hearing on May 8, 1992, which continued on June 19, 1992, and June 26, 1992. Defendant Gobey, Detective Raymond Ayon, Special Agent Robert Hislop, and Ms. Nora Hawkins (an employee of the Denver County Court) presented testimony. The facts hereinafter recited constitute the court's factual findings concerning the suppression issues. After reviewing the testimony presented at the hearing and examining the briefs filed by the parties, I conclude that defendant's motion to suppress must be denied because I find that the arrest was lawful, the search was consensual and did not exceed the scope of the consent, and the consent was not effectively revoked.

FACTS

In the morning of February 18, 1992, Denver Police Detective Ayon, [*3] a 15-year veteran of the police force, received a call from the director of security at the Stouffer Hotel, near Stapleton International Airport. The call concerned the unusual activities of a guest who had just checked into a top-floor room of the hotel. The director of hotel security reported the following to Detective Ayon: (1) the guest, Defendant Jeffrey Robert Gobey, asked for a

top-floor room facing east (which meant that he had a view of Quebec Street and the airport); (2) defendant asked a bell hop for the location of the side exits from the hotel; (3) defendant's luggage included what appeared to be gun or rifle cases; (4) defendant brought a pit bull dog with him when he checked in; and (5) defendant tacked to the hallway-side of his hotel room door a poster depicting a caricature of a black man's face in a circle with a line drawn diagonally across the circle.

Detective Ayon checked police records, including intelligence reports, and learned that defendant was believed to be associated with a motorcycle gang called the "Sons of Silence" in Colorado Springs and should be considered armed and dangerous. The Sons of Silence was under investigation concerning the gang's affiliation [*4] with the Ku Klux Klan and other white supremacist groups. Defendant's criminal record included felony menacing and various weapons charges.

Detective Ayon also discovered that defendant was wanted on an outstanding bench warrant for failure to appear on a complaint charging him with possession of an unlawful knife, in violation of a Denver ordinance. Defendant had failed to appear on July 23, 1991. Detective Ayon verified that the warrant was still current by checking with the clerk's office of the Denver General Sessions Court, a division of the Denver County Court.

Detective Ayon consulted with Sergeant McNallis and they decided to arrest defendant on the outstanding bench warrant. Sergeant McNallis considered the information given to Detective Ayon by hotel security,

together with defendant's criminal record and gang affiliation, sufficient to justify the services of the Denver Metro Swat Unit to make the arrest, The Swat Unit also decided to contact the United States Secret Service, as the officers were concerned about a potential assassination attempt on the Vice President.

Secret Service Special Agent Hislop, an agent who had been with the Secret Service for 18 years and who [*5] was assigned to protect the Vice President, joined Detective Ayon and Sergeant McNallis at the hotel sometime between 11:30 a.m. and noon. `Ihe other officers present at the hotel were Sergeant Conners, Officer Sconce, and Technicians Berebach and Zimmerman. With the assistance of the director of hotel security, Wayne Hoskins, the Swat Unit set up a "command room" in room 1112, the room next to defendant's room, number 1111.

At about 12:30 p.m., Detective Ayon, disguised in a room service jacket, knocked on defendant's door and announced, "Housekeeping! " Defendant, having been awakened by the knock on the door, answered the door in his underwear and without his glasses. Technician Berebach grabbed defendant and forced him face-down on the carpeted hallway while Special Agent Hislop handcuffed him. The officers took defendant next door to room 1112 and sat him on the bed. Detective Ayon immediately read defendant his Miranda rights. Defendant indicated that he understood his rights and wished to waive them. Defendant was not under the influence of alcohol or controlled substances at this time. Present in the room were Detective Ayon, Special Agent Hislop, Sergeant McNallis

and possibly [*6] Officer Sconce. Mr. Hoskins may also have been in the room. Sergeant Conners may have been in and out of the room. Technicians Zimmerman and Berebach remained in the hallway, securing the entrance to room 1111. Detective Ayon was still dressed in the room servicejacket, Special Agent Hislop and Sergeant McNallis were attired in business suits, and Sergeant Conners was in uniform. All were armed, but no weapons were brandished.

Immediately after defendant was seated on the bed in room 1112 and had waived his Miranda rights, Special Agent Hislop began to talk with him. Special Agent Hislop asked defendant if he knew what the Secret Service was and explained that his job was to protect the Vice President. Special Agent Hislop indicated his concern that defendant might pose a danger to the Vice President. Defendant disavowed any intent to harm the Vice President. Defendant also said that he had no weapons except some knives and had nothing to hide.

The parties strenuously disagree on what occurred next. I find that Special Agent Hislop asked defendant if the officers and agents could search defendant's room and bags for persons or weapons that could possibly harm the Vice [*7] President. Defendant responded by repeating that he would not harm the Vice President, and Special Agent Hislop then repeated his request for consent to search. Defendant consented to the search requested by Special Agent Hislop. Defendant admits that no one put a gun to his head, yelled at him, or threatened him. At some point during this exchange, defendant, still in his underwear, indicated that he was cold. He did not ask if he could get

dressed. Special Agent Hislop draped a large towel around defendant. There is no evidence that defendant asked for his glasses at any time before the search or that the agents refused to provide them upon request. (Defendant was given his glasses at some point after the search.)

After Special Agent Hislop obtained consent to search, he, Detective Ayon, and other agents took defendant back to his own room. Because defendant's pit bull was still in the room, no agent had displayed the temerity to enter. The dog began barking as defendant and the agents entered. Two agents cornered the dog so that the room could be searched. The presence of the pit bull unnerved the agents. Defendant testified that the agents threatened to shoot his dog and one agent [*8] drew his weapon. Defendant was crying and pleading with the agents not to hurt his dog. Defendant, still handcuffed and draped with the towel, was seated on the floor in the center of the room.

A search commenced. The testimony was conflicting concerning the questions of (1) how the search was conducted and (2) when defendant revoked, or tried to revoke, his consent. I find that Special Agent Hislop, without objection by defendant, immediately began searching one of defendant's bags near the center of the room. Detective Ayon was searching the other bag near the door. Special Agent Hislop found a gun holster and a clip containing rounds in one of defendant's bags. Detective Ayon recovered from the other bag a threebeam scale with weights and (in a side pocket) a plastic bag containing a white powdery substance consistent in packaging and

appearance with methamphetamine. Although defendant's eyesight is poor and he could not watch both Special Agent Hislop and Detective Ayon simultaneously, and although he was undoubtedly preoccupied by the uproar concerning his dog, I find that defendant was aware of the fact that both officers were searching, as they had all agreed while they were [*9] in the adjacent room. Defendant did not object to the search until Detective Ayon pulled out the plastic bag containing the methamphetamine. At this point, defendant exclaimed to Special Agent Hislop, "You fucked me over! Stop the search! or words to that effect.

After the search was stopped, defendant was held in the room for several hours while the agents sought a search warrant. After receiving the search warrant, the agents discovered an automatic revolver under a chair cushion and additional KKK paraphernalia (There was no evidence as to when or where the officers found the currency which defendant seeks to suppress.)

Detective Ayon took defendant to the station where defendant was given a written Miranda advisement to read. Detective Ayon testified that defendant read the advisement, appeared to understand it, and signed and initialed it in his presence. Detective Ayon signed as a witness. Defendant denied that the initials and signature on the advisement were his. I find that this denial is perjurious. The signature, such as it is, on exhibit 8 (the advisement form) is clearly the same as the handwriting which appears on defendant's Colorado Identification Card, ex. 15, [*10] and the Financial Affidavit, dated March 11, 1992, filed with his request for the appointment of a federal public

defender. Exhibits 5 and 6 also contain exemplars of defendant's signature which are in the same handwriting as that which appears on exhibit 8. My conclusion that defendant's testimony was perjurious in this matter has affected my evaluation of his credibility concerning events already described. In any event, defendant does not deny that he understood the written advisement form or that he was allowed to read it.

ANALYSIS

The Arrest

Defendant first argues that Special Agent Hislop's participation in defendant's arrest transformed a state arrest into a federal one. Consequently, defendant argues, the warrant must satisfy federal standards. Defendant's Memorandum in Support of Motion to Suppress ("Memorandum in Support") P 3 (filed June 25, 1992). I disagree. At the time of his arrest, defendant had a state charge pending against him. There was a state bench warrant for his arrest issued by a state judicial officer. The agents testified that they went to the hotel to arrest defendant pursuant to that state warrant. I find that it was a state, not [*11] a federal, arrest. Thus, the bench warrant "need only conform to federal constitutional requirements in order to be admissible in a federal prosecution. " United States v. *Morehead, 959 E2d1489,1497(10thCir. 1992)* (quoting United States *v. Gibbons, 607E2d 1320, 1325* [10th Cir. 1979]); United States v *Bookout, 810 E2d 965, 967 (10th Cir. 1987).*

Defendant next argues that the warrant on which he was arrested did not conform to federal constitutional

standards and was thus invalid. Specifically, he claims that there was no war rant at all and that the piece of paper purporting to be a warrant did not conform to the mandate that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation. " U.S. Const. amend. IV. In order to address this claim, it is necessary to digress into a consideration of the simplified county court proceedings which led to issuance of the warrant.

The proceedings which culminated in issuance of a bench warrant began with an encounter between Gobey and the police on July 9, 1991. Denver police officers arrested defendant for carrying an illegal [*12] knife, a violation of a Denver city ordinance. The officers issued defendant a General Sessions Court "summons and complaint. " Ex. 3. General Sessions Court is a municipal court and is a division of Denver County Court. The Colorado legislature has been granted the constitutional authority to "provide simplified procedures in county courts for claims not exceeding five hundred dollars and the trial of misdemeanors. " Colo. Const. art. VI, § 21. Pursuant to that authority, the legislature enacted a body of law denominated "Simplified Procedures in the County Court." Colo. Rev. Stat. § 16-2-101 to 16-2201 (1986 Repl. Vol. & 1992 Supp.). Court rules governing this simplified procedure have also been adopted. See, e.g., Colo. R. Crim. P. 2, 4. 1; Rule 204 of the Colorado Municipal Court Rules.

Municipal courts are governed by the Colorado Municipal Court Rules, and the following citations are to those rules unless otherwise indicated. Rule 204(b)(3) authorizes the issuance of a summons and complaint by a

peace officer when an offense is committed in the peace officer's presence. See also Colo. Rev. Stat. § 16-2-1992 US. Dist. LEXIS 22060, *12 104 (1986 Repl. Vol.); Colo. R. Crim. R 4. 1 (c)(3). A "complaint" is L*13] a "written statement of the essential facts constituting a violation." Rule 203(a). A . summons" is a "notice to appear before the court." A ff summons and complaint" is a document which complies with the requirements of both a summons and complaint. Rule 203(h).

The content of a summons and complaint is governed by rule 204(b)(4). It must contain the name of the defendant, a description of the offense charged (in words or by reference to the ordinance provision violated), the date and location of the offense, and the location, time, and date on which the person charged must appear in court. Id. Contrary to defendant's assertion, it does not have to be verified or otherwise sworn to under oath. Id.; *Stubert v. County Court, 163 Colo. 535, 552, 433 R 2d 97, 105 (1967)* (en bane). 'The summons and complaint is signed by the arresting officer, who has "stated" therein that "he has reasonable grounds for believing that the aforementioned offense or offenses was or were committed in fact, and was or were committed by the Defendant against the peace and dignity of the People of the City and County of Denver, and the People of the State of Colorado." [* 14] Ex. 3. The offenses are spelled out in detail on the front and back of the summons and complaint. The summons and complaint also warns that if the person cited fails to appear on the specified date, "a warrant will be issued for your arrest." The arresting officer also certified with his signature that he

served a copy of the summons and complaint on defendant at the time of its issuance. Rule 204(e). A copy was also apparently filed with court as required by rule 204(b)(3).

Defendant does not deny that he received the summons and complaint or that he failed to appear in court on the date specified. On the back of the summons and complaint is a space provided to record the disposition of the case. Under the section "JUDGE'S NOTES (or Other Orders). " Magistrate Al Minton entered the date, July 23, 1991, "FTA" (failure to appear), "BW" (bench warrant), "BF " (bond forfeited), and "new bond $ 100 " (the amount of the new bond). Magistrate Minton's initials appear after these notations. The summons and complaint form with these notations was the only document in defendant's file on the day of his arrest. Ex. 3.

The Government takes the position that exhibit 3, with Magistrate Minton's notation [*15] "BW" and his initials, was the actual bench warrant. This position is supported by the testimony of Nora Hawkins, the office manager for Denver County Court. Ms. Hawkins testified as an expert on the operations and procedure of the Denver General Sessions Court, a division of Denver County Court. Ms. Hawkins testified that exhibit 3 was in fact a bench warrant. (It is not unusual that a document used for one purpose becomes a warrant upon signature of the judge or magistrate. See, e.g., *Massachusetts v. Sheppard, 468 US. 981, 985, 104 S. Ct. 3424, 3426, 82 L. Ed. 2d 737* [1984] [Massachusetts warrant application became search warrant when signed by judge]). Government's exhibit 2, although entitled "Warrant, " was, according to Ms.

Hawkins, a computer-generated warrant generally issued only after the defendant is already in custody and is used to aid in the booking procedure. I believe Detective Ayon was in error when he testified that exhibit 2 is the bench warrant for defendant's arrest which existed on February 18, 1992. The date on exhibit 2 indicates that it was generated not when defendant was taken into custody [*16] in February, 1992, but on May 7, 1992, only one day prior to the first day of the suppression hearing.

Ms. Hawkins' testimony concerning practice in the General Sessions Court is consistent with the pertinent rules. A bench warrant may be issued for the arrest of a person who fails to appear at the place and time specified in a summons and complaint. Rule 204(f); Colo. Rev. Stat. § 16-2-110 (Supp. 1992); Colo. R. Crim. P. 4. l(f). A "bench warrant" is not specifically defined in the statute or rules. A "warrant" is a "written order issued by a judge of a court of record directed to any peace officer commanding the arrest of the person named or described in the order." Colo. Rev. Stat. § 16-1-104(18) (1986 Repl. Vol.) (emphasis supplied). A bench warrant differs from an arrest warrant in that it does not depend on the sufficiency of affidavits and information sworn to by the police or prosecutor. A bench warrant for failure to app ear is supported by the judge's or magistrate's personal observation that a defendant has failed to appear. A bench warrant is issued for the failure to appear, not for the underlying offense. *Heine v. Connelly, 644 F Supp. 1508, 1513 (D. Del. 1986).* [*17] Thus, defendant's consternation over the lack of verification by the police ' officer for the underlying offense is simply a

red herring. A second red herring is defendant's apparent concern over Magistrate Minton's authority to issue a bench warrant. Pursuant to rule 5(d) of the Colorado Rules for Magistrates, a magistrate is empowered to issue bench warrants for the arrest of nonappearing defendants. There is nothing constitutionally disturbing about the fact that magistrates have been authorized to issue bench warrants. See *Shadwick v. City of Tampa, 407 US 345, 350-52, 92 S. Ct. 2119, 2123, 32 L. Ed. 2d 783 (1972)* (issuance of arrest warrants for municipal offenses by court clerks does not violate Fourth Amendment as long as they are detached and capable of determining probable cause).
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With this information, I am asked to determine whether exhibit 3 could lawfully be a bench warrant. I am satisfied that, under the simplified procedures permitted in municipal court, it is. Exhibit 3 clearly identifies defendant by name, address, date of birth, and physical description. The basis for issuing the warrant is stated, "FTA" [*18] - failure to appear. It is "issued" by a magistrate under his authority to issue bench warrants. I conclude that exhibit 3 adequately complies with Colorado statute and rules and that, as a matter of fact and practice, it is treated as a bench warrant.

The remaining question is whether exhibit 3 is invalid for failure to comply with the United States Constitution. I find that the document is surely supported by probable cause. When Magistrate Minton ordered that a bench warrant issue for defendant's failure to appear, his order was based on personal knowledge that defendant had

failed to appear. See *United States v. Evans, 574 F.2d 352, 355 (6th* Cir. 1978) (dictum) (bench warrants for failure to appear are valid and based on judge's probable cause).

It does not appear that the magistrate (or anyone else) swore to the observation that defendant had failed to appear. Defendant is therefore correct in arguing that the bench warrant is not "supported by Oath or affirmation." U. S. Const. amend. IV. Defendant has cited, and I have found, no authority concerning the effect of this omission. The reported authorities, rather, assume without discussion that [*19] there is no constitutional question concerning the validity of bench warrants issued for failure to appear. See id.; *United States v. Spencer, 684 F. 2d 220, 223 (2d* Cir. 1982), cert. denied, *459 US. 1109, 74 L. Ed. 2d* 960, 103 S. Ct. 738 (1983) (holding, on facts similar to those presented here, that officers investigating federal bank robbery charges properly entered defendant's home to arrest him on outstanding bench warrant for failure to appear on state misdemeanor charges); *In Re Grand Jury Proceedings,* 658 *F. 2d 211, 214 (3d* Cir 1981) ("The authority of a court to issue bench warrants to arrest witnesses who fail to appear is, in fact, unquestioned. ").

Similarity in nomenclature notwithstanding, I am satisfied that a "bench warrant" is not the type of "warrant" referred to in the Fourth Amendment. A "bench warrant" has been defined as "process issued by the court itself, or 'from the bench,' for the attachment or arrest of a person; either in case of contempt, . . . or to bring in a witness who does not obey the subpoena." Black's Law Dictionary at [*20] 142 (5th ed. 1979). Like the court's contempt power,

it is a coercive and drastic form of process designed to compel obedience to a court which has acquired jurisdiction over defendant's person, in circumstances where a less coercive means - such as a summons, subpoena, or court order - has failed. In contrast, an arrest warrant has nothing to do with compelling obedience to court orders or vindicating the authority of the court. It is rather, one form of process by which defendant may be brought before the court for the purpose of responding to some sort of claim or charge against him. See id. at 1421. It is based on a law enforcement officer's observations, not on a defendant's conduct as revealed in court records.

Defendant has cited, and I have found, no authority or reason supporting the application of fourth amendment requirements to bench warrants, as opposed to other sorts of warrants. Indeed, it appears that the amendment is supposed to be a limitation on the powers of those officers charged with the daily execution of the criminal law, a proposition evidenced by repeated suggestions that warrants are to be issued by neutral and detached officials. See, e.g., *United States v. Chadwick, 433 U.*S. 1, 9, 97 S. Ct. *2476, 2482,* 53 *L. Ed. 2d* 538 (1977); [*21] *Johnson v. United States, 333 U.S. 10, 14,* 68 S. Ct. 367, *369,* 92 *L. Ed.* 436 (1948); *O'Rourke v. City of Norman,* 875 F.*2d 1465, 1474-75* (10th Cir.), cert. denied, 493 U.S. 918, 107 *L. Ed. 2d 260, 110 S. Ct. 280* (1989). It is not sensible to apply all of the Fourth Amendment's formal requirements to bench warrants which are issued on the observations or records of those very same neutral and detached officials. I therefore conclude that there is no legal requirement for the

bench warrant here to have been issued only upon the oath or affirmation of the magistrate.

Also, Detective Ayon was not required to have the bench warrant in hand when defendant was arrested. An officer is authorized to arrest a person without a warrant when he "has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested." Colo. Rev. Stat. § 16-3-102(l)(c) (1986 Repl. Vol.); *United States v. Maher, 919 F.2d 1482, 1485 (10th Cir. 1990)* ("constitutional [*22] validity of a warrantless arrest depends on whether the arresting officer had probable cause"). Probable cause maybe based "on facts provided to [the arresting officer] by fellow officers or others...." People *v. Mitchell, 678 P.2d 990, 997 (Colo. 1984)* (Rovira, J., dissenting) (citations omitted) (emphasis supplied); *Smith v. City of Oklahoma City, 696 F.2d 784, 786 (10th Cir. 1983)* (reliable hearsay evidence may be relied on to support arrest warrant); *Heine, 644 F. Supp. at 1514* (no constitutional violation when police rely on computer printout indicating outstanding warrant); *Cotner v. Sharp, 567 F. Supp. 888 (W.D. Okla. 1983)* (not improper to rely on hearsay evidence of a bench warrant to support an arrest). The *1992 US.* Dist. LEXIS *22060, *22* facts supporting probable cause must be considered from the viewpoint of a "reasonable and prudent person, in light of that person's training and experience. " Mitchell, *678P.2d at 996.* The agents simply "executed the magistrate's determination of probable cause based on his own perception" that defendant did not *[*23]* appear. *Heine, 644*

F. Supp. at 1514 n. 6 The Fourth Amendment does not require more.

Even if no bench warrant were in fact issued, or if it were deficient, defendant's arrest was not illegal. I conclude that the same principles guiding the Court's decision in *United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984),* should apply to an officer's good faith reliance on a bench warrant. In Leon, the Court held that the exclusionary rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was objectively reasonable, even though the warrant was ultimately found to be unsupported by probable cause. The Court relied on three factors in concluding that the exclusionary rule should not be applied. First, the exclusionary rule was historically designed "to deter police misconduct rather than to punish the errors of judges and magistrates. " 468 *U.S. at 916, 104 S. Ct. at 3417.* Second, there was "no evidence suggesting that judges and magistrates *[*24]* are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. " Id. Third, and of greatest importance to the Court, there was no basis "for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate. " Id. The reason for this, the Court ex plained, is that, "as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. " Id. *at 917, 104 S. Ct. at 3417.*

The proper application of the exclusionary rule is restricted to those situations in which its remedial purpose is effectively furthered. Before extending Leon to bench warrants, I thus must consider whether application of the exclusionary rule in this context could be expected to alter the behavior of police officers. If the officer is acting in an objectively reasonable manner, as he should be, excluding evidence so obtained will not affect the officer's future conduct "unless it is to make him less willing to do his duty. " Id. *at 920, 104 S. Ct. at 3419, [*25]* quoting *Stone v. Powell, 428 U.S. 465, 540, 96 S. Ct. 3037, 3073, 49 L. Ed. 2d 1067 (1976)* (White, J., dissenting).

Ms. Hawkins described the standard procedure followed when an officer calls the court for a check for outstanding warrants. Before answering, the clerk makes two verifications to ensure the validity of the bench warrant. The clerk first checks the computer records, and then pulls the actual file containing the bench warrant. The clerk is not permitted to verify an outstanding warrant without having the file in hand. All calls requesting clearance for warrants are recorded on a daily log. The log for the day of defendant's arrest reflects such a call. Ex. *14.* This verification procedure "supports objectively reasonable reliance" by officers requesting clearance checks. See *Illinois v.* Krull, *480 U.S. 340, 355, 107 S. Ct. 1160, 1170, 94 L. Ed. 2d 364 (1987)* (statute cannot support reasonable reliance under Leon if "reasonable officer should have known that the statute was unconstitutional").. There was no evidence to suspect that Detective Ayon could *[*26]* not objectively in good faith rely on the warrant information.

Making the arrest on the basis of the court's representation that there is an outstanding warrant is exactly what the community expects the police officer to do. *Stone v. Powell, 428 U.S. at 539, 96 S. Ct. at 3073* (White, J., dissenting). A police officer should not be required to physically go to the court records to see for himself whether there is a warrant outstanding. I find that Detective Ayon reasonably relied and was entitled to rely on the information he received from the court clerk. I therefore conclude the approach used in Leon is equally applicable to this case. I note also that it appears the Tenth Circuit would support the application of Leon to arrest warrants. *Salmon v. Schwarz, 948 F.2d 1131, 1136 (10th Cir. 1991)* (using objectively reasonable standard to evaluate officer's reliance on arrest warrant). See also *United States v. De Leon-Reyna, 930 F.2d 396, 400 (5th Cir 1991)* (applying good faith exception to arrests under Leon where officer relied on erroneous information [,*27] from dispatcher in making arrest). The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on the representation that a warrant exists for the defendant's arrest would have little, if any, deterrent effect on the officer's actions. Even if I am in error that the bench warrant existed and the arrest was lawful, a deficient warrant does not transform defendant's arrest into an unlawful one. As long as the police "acted in good faith reliance upon the warrant process, " defendant's contention that the warrant was deficient is "irrelevant. " United *States v Hunt, 893 F.2d 1028, 1032 (9th* Cir. 1990) (citing *United States v. Leon, 468 U. S. 897, 104 S. Ct.*

3405, 82 L. Ed. 2d 677 [1984]), revised as to other grounds, *925 F.2d 1181 (9th* Cir. 1991). The officers were entitled to rely in good faith, and the absence of any police illegality precludes the application of the exclusionary rule. The arrest of defendant was lawful.

The Search

The full protections of the fourth amendment prohibition [*28] against unreasonable searches and seizures extend to defendant's privacy interest in his hotel room. *Stoner v. California, 376 U.S. 483, 490, 84 S. Ct. 889, 893, 11 L. Ed. 2d 856 (1964).* Because a warrantless search or seizure is ordinarily regarded as unreasonable, the Government must establish that the officers' conduct falls within a recognized exception to the warrant requirement. *Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043, 36 L. Ed. 2d 854 (1973);* United States v. *Anthon, 648 F.*2d 669, 675 (10th Cir. 1981), cert. denied, *454 U.S. 1164 (1982).* The Government contends that defendant voluntarily consented to the search of his hotel room and bags; thus, no warrant was required. *Schneckloth, 412 U.S. at 222, 93 S. Ct. at 2045.*

Defendant does not deny that he gave some sort of consent for the agents to search his room. Defendant argues, however, that any consent he gave (1) was not voluntary; (2) was limited to a "look [*29] around" the room for persons who could harm the Vice President; and (3) was withdrawn immediately after he observed the agents exceeding the scope of the consent. I will address each contention in order.

1. Voluntariness

The Government has the burden of proving that consent was given freely and voluntarily. Id. Whether consent is voluntary is a question of fact to be determined from the totality of the circumstances. Id. *at 227, 93 S. Ct. at 2047-48.* There are three requirements to sustain a finding of voluntary consent: (1) there must be clear testimony that consent was unequivocal, specific, and freely and intelligently given; (2) the Government must prove consent was given without duress or coercion, express or implied; and (3) there must be convincing evidence of consent. *United States v. Price, 925 F.2d 1268, 1271 (10th Cir. 1991).*

Defendant argues that consent was not voluntary because he, disoriented from having just being awakened, was suddenly and violently arrested, handcuffed, and marched in his underwear to an adjacent room where he was surrounded by officers and interrogated. [*30] While these events could possibly have been unsettling, I must keep in mind that defendant admittedly was not in any way a novice to the criminal justice system. I consider defendant's prior experience with law enforcement officers important in considering the voluntariness issue. The court's assessment of the totality of the circumstances includes "both the characteristics of the accused and the details of the interrogation. " *Schneckloth, 412 U.S. at 226, 93 S. Ct. at 2047.* See also *United States v. Watson, 423 U. S. 411, 424-25, 96 S. Ct. 820, 828, 46 L. Ed. 2d 598 (1976)* (fact that defendant was not a newcomer to the law was a factor in evaluating voluntariness). Defendant testified that he had over ten "experiences" with law enforcement and

was familiar with his Miranda rights. Exhibits produced at the hearing reveal several arrests and at least two felony convictions. Exs. 4-6. Although it is not clear how many of these arrests and convictions were known to Detective Ayon prior to the arrest, he testified that he knew of various weapons charges. He also [*31] knew of defendant's motorcycle gang and white supremacist affiliations. He was told to presume that defendant was armed and dangerous. The firm manner in which the agents were entitled to, and did, treat defendant would not necessarily have unduly intimidated defendant. Defendant appeared to be an intelligent young man certainly capable of understanding his Miranda rights. I thus consider the fact that defendant was arrested and handcuffed in this manner as providing little evidence that defendant's consent was involuntary. See also, *United States v. Watson, 423 U. S. 411, 424, 96 S. Ct. 820, 828, 46 L. Ed. 2d 598 (1976)* ("fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search"); *United States v. Shields, 573 F.2d 18, 23 (10th Cir. 1978)* (consent given while in custody must be viewed with caution, but may still be valid); *United States v. Tolias, 548 F.2d 277, 278 (9th Cir. 1977)* (valid consent can be given while defendant is under arrest); *United States v. Abreu, 730 F. Supp. 1018, 1030 (D. Colo. 1990),* [*32] aff'd, *935 F. 2d 1130* (10th Cir.), cert. denied, *116 L. Ed. 2d 224, 112 S. Ct. 271 (1991)* (waiver of fourth amendment rights is valid even though defendant was in custody).

Shortly after receiving and waiving his Miranda rights, defendant conversed with Special Agent Hislop.

Special Agent Hislop's gun was holstered. There were between four and five officers in the hotel room "suite" 1112, but it is not clear whether defendant could see or was aware of all of them. Special Agent Hislop began by explaining his responsibilities as a member of the Secret Service and related his concerns about defendant's activities. Defendant participated in the conversation with Special Agent Hislop. Defendant was not under the influence of alcohol or any controlled substances. When defendant indicated that he was cold, he received a towel to cover himself. Only after all this occurred did Special Agent Hislop request consent to search. I find that any initial disorientation from having been awakened from sleep had dissipated by this time. There is no evidence that defendant ever asked to have his glasses or to get dressed [*33] prior to giving consent, or that those requests were denied, so I do not consider those facts to affect the voluntariness analysis. Defendant admits that no guns were put to his head. He admits that no voices were raised, nor was he threatened in any manner. I conclude that, whatever the level of discomfort defendant felt, it did not make his consent involuntary. The evidence demonstrates that defendant knew of his right to refuse consent, because he did later demand that the search be stopped. In the totality of the circumstances, I find that the facts presented by the Government demonstrate by clear and convincing evidence that defendant voluntarily and freely consented.

2. Scope of Consent

Both Detective Ayon and Special Agent Hislop testified that they asked for consent to search defendant's

room, although Special Agent Hislop remembered the request was to search, defendant's room and bags. Special Agent Hislop specifically asked defendant about persons or weapons that could harm the Vice President. Defendant contends he limited his consent to a "look around" his room for "persons. " Because it was not likely that a person was hiding in one of defendant's bags, [*34] the scope of the search is a decisive factor in determining whether the search was lawful.

The scope of the consent given should be considered in the totality of the circumstances. *United States v. Price, 925 F.2d 1268, 1272 (10th Cir. 1991).* The Government has the burden of proof on this issue as well. *United States v. DeWitt, 946 F.2d 1497, 1500 (10th Cir. 1991),* cert. denied, *112 S. Ct. 1233 (1992).* Defendant urges me to find his version more credible because it would not make sense for defendant to consent to a search of his bags, knowing that he had a large quantity of drugs in one of those bags. However logical this contention may appear, I do not find it convincing. This argument has also been rejected by several courts. *United States v. Mendenhall, 446 U.S. 544, 559, 100 S. Ct. 1870, 1880, 64 L. Ed. 2d 497 (1980)* (consent to a body search which revealed two bags of heroin); *United States v. Williams, 754 F. 2d 672, 675-76 (6th Cir. 1985)* (consent to search of box containing cocaine). It is possible, [*35] of course, that defendant believed it would be in his self-interest to cooperate with the search. *Mendenhall, 446 U.S. at 559 n. 7, 100 S. Ct. at 1880 n.7.* It is possible that defendant believed that if he gave consent, the agents "might be persuaded that it was

not necessary to proceed with the search. " *Williams, 754 F.2d at 676.* This is consistent with his statement to Special Agent Hislop that he "had nothing to hide. " My determination does not rest on "whether the [defendant] acted in [his] ultimate self-interest [when he gave consent to search], " but on the totality of the circumstances. *Mendenhall, 446 U.S. at 559, 100 S. Ct. at 1880; Price, 925 F.2d at 1272.*

Defendant also asserts that testimony by Detective Ayon supports his position that the scope of the consent was limited. Detective Ayon testified that after the drugs were discovered, defendant said to Special Agent Hislop, "you fucked me over. " The implication of this statement, defendant argues, is that the agents exceeded defendant's limited consent; [*36] in essence, defendant was saying, "You tricked me." The Government suggests that Detective Ayon may have mistakenly recalled the statement, asserting that Detective Ayon's report prepared soon after the search made no mention of that remark. Neither the court file nor the exhibits introduced at the hearing contain Detective Ayon's report, and I am thus unable to review it. Special Agent Hislop testified that defendant's statement was, "I'm fucked. " Detective Ayon also remembered this statement.

Even if the statement asserted by defendant was made, it does not necessarily suggest the agents exceeded the scope of the search. Defendant's statement just as likely could have been made in exasperation by "one whose crime has been uncovered. " DeWitt, *946 F. 2d at 1501.* I do not find that the statement, if made, is determinative of the scope of the consent.

Special Agent Hislop testified that it is critical to "leave no stone unturned" when investigating the possibility of an assassination attempt. He testified that while he would be interested in searching for persons who could harm the Vice President, he would also want to look for items which could and would [*37] most likely be stored in bags or containers of some sort. These items could include weapons, bombs, bomb makings, and two-way radios or other radio-activating devices. He would naturally want to investigate for these types of items because, for example, finding evidence of a bomb or a radio would then alert him to search elsewhere, perhaps along the motorcade route or other areas where the Vice President was expected to go. Special Agent Hislop was also aware that defendant had two visitors to his room. He would want to look for evidence indicating whether those visitors may be involved in a possible assassination attempt. It would not be reasonable to conclude that Special Agent Hislop only asked for consent to look for "persons. " His responsibilities and concerns did not end at simply establishing there were no other persons in defendant's room. As I noted previously, he explained to defendant that he was concerned about the safety of the Vice President. He asked specifically asked defendant if there were any weapons in his room or bags. It was clear what the purpose of the search was. See United States v. *Gilmer, No. 92 CR 32, 1992 WL 113574,* at *9 (D. Colo. May 21, 1992) [*38] (defendant must know purpose of search). Believing the agents' version to be more plausible under the circumstances of this case, I find that defendant's consent

was given for the search of his room and bags for persons and weapons. I next consider what such a search would encompass.

The standard for measuring the scope of a person's consent is that of objective reasonableness - "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno, 500 U.S. 248, 111 S. Ct. 1801, 1803-04, 114 L. Ed. 2d 297 (1991).* I have concluded that consent was granted for the search of the room and bags for persons and weapons. Consent to search a room or other fixed premises "generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts or entry or opening may be required to complete the search. " *United States v. Ross, 456 U.S. 798, 820-21, 102 S. Ct. 2157, 2170-71, 72 L. Ed. 2d 572 (1982); Jimeno, 111 S. Ct. at 1804* [*39] (scope of a consent search is generally limited by its "expressed object"; police may search containers in the area if would conceal the object of the search); *United States v. Salinas-Cano, 959 F.2d 861, 863 (10th Cir. 1992)* (search of room may include the search of closed containers in the room if the person consenting has the authority to give consent); *United States v. Harris, 928 F.2d 1113, 1118 (11th Cir. 1991)* (defendant should interpret consent to look for drugs to include places where drugs could reasonably be hidden). There is no dispute that defendant had such authority over his room and belongings. I conclude that the consent to search the room included the opening of

defendant's bags since they could reasonably conceal the object of the agents' search.

3. Withdrawal of Consent

Having determined that defendant had consented to the search of his room for weapons, and that the consent reasonably extended to his belongings in the room, I now consider whether defendant effectively withdrew his consent. Defendant asserts that immediately upon noticing that the agents had focused their attention on his bags [*40] - that they were going beyond the scope of the consent - and prior to the discovery of the drugs, he withdrew his consent by verbally objecting to the search. Defendant claims that the agents ignored him and continued to search, eventually finding the methamphetamine and the gun clip in one of the bags. The Government contends that defendant watched and acquiesced in the search, and did not object in any way until Detective Ayon pulled out the bag of methamphetamine. The agents testified that they stopped immediately after defendant objected and sought a search warrant to complete the search of the room.

Defendant does not dispute that when the search began he was seated without his glasses on the floor in the center of the room. One bag was in the center of the room and one bag was near the door. The pit bull was restrained in one comer by two officers. Special Agent Hislop began searching the bag near the center of the room, which did not contain drugs. Detective Ayon concentrated on the bag near the door, somewhat behind the place where defendant was seated. Defendant admitted to being very concerned for his dog, and his attentions were focused more or less on

that comer of the [*41] room. The agents testified that defendant was asked for his assistance in calming the dog. The dog had been barking and the officers were edgy. It is plausible to think that because defendant's concerns were riveted elsewhere, though not as a result of intentional distraction by the agents, he either did not realize exactly what was being searched until the drugs were discovered, or he watched Special Agent Hislop search one of the bags, unaware that Detective Ayon was searching the other bag with the drugs behind him. This scenario is consistent with Detective Ayon's testimony that when he pulled out the plastic bag containing methamphetamine and held it up, it was then that defendant looked around at him and demanded the search be stopped. At that point, of course, withdrawal of consent is ineffective as to the evidence already discovered. I do not believe that the agents continued to search after being told to stop. After discovering the drugs, they had probable cause to secure a search warrant. By continuing to search after being told to stop, they would only have jeopardized the admissibility of evidence found thereafter. Accordingly, I find that defendant did not effectively [*42] withdraw his consent.

The Advisement Form

Although defendant admittedly twice received his Miranda warnings verbally, he maintained at the suppression hearing that he did not sign the written advisement form given to him at the police station. Ex. 8. I have already suggested that I find defendant's claim to be perjurious. Trial judges are competent to base conclusions upon their examination and comparison of handwriting

samples. Fed. R. Evid. 901(b)(3); *MoKan Teamsters Pension Fund v. Creason, 716 F.2d 772, 775 (10th Cir. 1983)*, cert. denied, *464 U.S. 1045, 79 L. Ed. 2d 178, 104 S. Ct. 716 (1984)*. I conclude without difficulty that defendant signed exhibit 8.

Upon the foregoing findings and conclusions, it is therefore

ORDERED that defendant's motion to suppress is denied.

Dated this 12 day of September, 1992.

BY THE COURT:

EDWARD W. NOTTINGHAM

United States District Judge

(2)

MOTION FILED

NOV 15 1999

No. 99-522

In The
Supreme Court of the United States

CITY OF MACEDONIA; ET AL.
Petitioners,

v.

CHRISTOPHER DEPIERO,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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AMICUS CURIAE BRIEF OF ORANGE VILLAGE, OHIO IN SUPPORT OF THE PETITIONER, THE CITY OF MACEDONIA AND MOTION AND JOINT *AMICUS CURIAE* BRIEF OF THE OHIO MUNICIPAL LEAGUE

---

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MOTION BY THE OHIO MUNICIPAL LEAGUE FOR LEAVE TO FILE AN BRIEF AS AN *AMICUS CURIAE.*

Now comes the Ohio Municipal League, (hereinafter, sometimes, "the League") by and through counsel, and hereby moves this court for leave to participate as an *amicus curiae*, supporting the petition of the City of Macedonia, et al., for a writ of *certiorari*. The League is tendering a brief jointly with Orange Village, Ohio, which is permitted to file an *amicus curiae* brief, as a matter of right, pursuant to Section 4 of Rule 37 of the Rules of the Supreme Court of the United States. Barry M. Byron is special counsel to the Ohio Municipal League and is the chief legal officer (i.e. law director) of Orange Village, Ohio.

Pursuant to Section 2(a) of Rule 37 of the Rules of the Supreme Court of the United States, if a prospective *amicus* does not receive the consent of both parties, the *amicus* must petition the court for leave to file the brief, indicate which party has withheld consent and advise the court of the nature of the movant's interest.

The petitioner, the City of Macedonia, was willing to grant consent, but when the League sought the consent of the counsel for respondent in this case, i.e. Augustin F. O'Neil, consent was denied.

The League is a non-profit Ohio Corporation composed of a membership of 802 Ohio cities and villages, many of which have a mayor's court. The option of "Mayor's Court" is permitted under Ohio statutory law. Ohio Revised Code Chapter 1905.

The League, as a proposed *amicus*, believes that this court and the Sixth Circuit are defining due process for Ohio, and Ohio's municipalities which operate mayor's courts, in a fundamentally different manner than due process has been defined for Kentucky. In North v. Russell, 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976), this court held that Kentucky's use of the right to a *de novo* appeal cured what was argued to be a due process violation. Not four years earlier, in Ward v. Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), this court held (without any citation to precedent) that a *de novo* trial could not be used to cure an alleged due process violation.

As a consequence of this disparate treatment, the Sixth Circuit Court of Appeals has put Ohio's municipalities and mayors at risk of being found to have committed constitutional violations if the municipality and its mayor hold court as permitted under Ohio law. The League, and its constituent members (including *amicus curiae* Orange Village, which has a Mayor's Court), have an interest in having this court determine whether or not the Sixth Circuit's

decision in this case accurately analyzes the constitutional issues presented herein.

As an additional point in support of this motion, the Ohio Municipal League is composed of entities which are permitted, pursuant to Section 4 of Rule 37 of the Rules of the Supreme Court of the United States, to file *amicus curiae* briefs as a matter of right. Consequently, the League respectfully requests leave to represent those municipalities before this court to, *inter alia*, advise this court of certain policy reasons for the Ohio's mayor's court system, which reasons may not be fully explicated by the parties to this case.

It is for these reasons that the Ohio Municipal League moves for leave to participate as an *amicus curiae* in the instant case.

STATEMENT OF *AMICUS* INTERESTS

Orange Village is a duly established, existing Ohio municipal corporation which exercises home rule authority pursuant to Article XVIII, Section 3 of the Ohio Constitution. (Appendix i) Pursuant to Article XVIII, Section 7 of the Ohio Constitution, Orange Village has enacted a charter and exercises its home-rule powers pursuant thereto.(Appendix i.)

Under Section 3 of Article IV of the Orange Village Charter, the Mayor of Orange Village "*** shall have all the

judicial powers granted to Mayors by the laws of Ohio." (Appendix iv)

Further, pursuant to Section 5 of Article IV of the Orange Village Charter, the Mayor of Orange Village also exercises significant executive authority, including but not limited to being the chief executive officer of the Village (Section 5(A) of Article IV of the Orange Village Charter), supervision of the administration of the Village's affairs (Section 5(A)(i) of Article IV of the Orange Village Charter), control of all of the departments of the Orange Village government (Section 5(A)(ii) of the Orange Village Charter), being the chief conservator of the peace and causing all of the laws and ordinances to be enforced within the Village (Section 5(A)(iii) of the Orange Village Charter). (Appendix iv-viii)

The Mayor of Orange Village also appoints the Chief of Police and all of the members of the Orange Village Police Department (Section 1 of Article V of the Orange Village Charter). (Appendix viii-ix)

As a consequence of the Sixth Circuit's ruling in the instant case, Orange Village and its mayor have been forced to alter the Village's method of conducting Mayor's Court – as otherwise permitted under Ohio law – or face exposure, pursuant to 42 U.S.C. Section 1983, for violating "clearly established" law. See, *Harlow v. Fitzgerald*, 457 U.S. 800,

818 (1982). Orange Village, therefore, has an interest in seeing the Sixth Circuit's decision reviewed by this court.

The prospective *amicus*, the Ohio Municipal League, is composed of over 800 cities in villages in the state of Ohio, many of which seek to operate a mayor's court, pursuant to existing statutory authority, which permits such courts to be operated by a municipality which does not have a municipal or county court within its municipal boundaries. If the mayors of many of these municipalities operate these courts, as permitted under state law, they face potential liability in light of the Sixth Circuit's decision in this case.

The *amicus* and prospective *amicus* urge this court to accept jurisdiction over this case and review the decision below; there should not be one definition of due process in Kentucky and a different definition of due process in Ohio.

SUMMARY OF THE ARGUMENTS

I. The *amici curiae* incorporate, by reference, the arguments of the petitioner, the City of Macedonia. The effect of the decision of the Sixth Circuit Court of Appeals in this case upon municipalities has been accurately described by petitioner in section I.A. of its brief. The activities of Ohio's mayor's courts have been severely curtailed. In order to avoid needless repetition, however, the arguments of petitioner will not be repeated in this brief.

II. The decisions of this court in North v. Russell, 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976), and Ward v. Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), are fundamentally inconsistent. A *de novo* appeal in Kentucky was held to have erased the alleged due process violation; in Ohio it was not.

III. The Sixth Circuit Court of Appeals decision in this case has had the effect of fundamentally altering Ohio's judicial system. By ruling as it has, the Sixth Circuit Court of Appeals has eliminated the option of allowing the defendant to first be heard at the local level, and to hear the live testimony and view evidence supporting the charges before proceeding to the municipal court. Viewed in this way, the mayor's court proceeding, in addition to providing the option of resolution to the case at the local level, can be seen as giving the defendant a form of discovery. Thus, Ohio's mayor's court provides more process than would otherwise be available to a defendant in a criminal case pending in a court of general criminal jurisdiction (where discovery would be limited by Ohio's Rules of Criminal Procedure.)

VI. Ohio's court system, including the availability of mayor's courts, provides due process when the totality of the procedure is viewed.

ARGUMENT

THE CASE OF *NORTH V. RUSSELL* OVERRULED LANGUAGE IN *WARD V. MONROEVILLE* WHICH STATED A *DE NOVO* APPEAL OF RIGHT CAN NOT CURE A DUE PROCESS VIOLATION.

The essence of the amici's argument is that Ohio should be treated the same as Kentucky.

Both Ohio and Kentucky have provided a defendant the right to have a local offense adjudicated locally. In Ohio, a traffic offense, a misdemeanor offense or a violation of a local ordinance committed within the municipality, tried at the local level, subject to certain limitations. Ohio Revised Code Section 1905.01(A) (Appendix i) In Ohio, if the maximum penalty in the case includes jail time or fine in excess of one hundred dollars ($100), the defendant is entitled to a trial by jury. Ohio Revised Code Section 2945.17. (Appendix iv)

In Ohio, like Kentucky, the defendant is provided, as a matter of right, an appeal from the mayor's court. Ohio Revised Code Section 1905.22 (Appendix vii) This appeal is *de novo*. Ohio Revised Code, Section 1905.25 (Appendix iv) Further, Ohio law provides for an automatic and mandatory stay of mayor's court proceedings upon the filing

of the notice of appeal. Ohio Revised Code Sections 1905.23 (Appendix at iii) Under Ohio law, long standing precedent holds that the appeal *de novo* erases all of the legal and factual determinations of the lower court, from which the appeal is taken. Kilgore v. Emmitt (1878), 33 Ohio St. 410; Wanzner v. Self (1876), 30 Ohio St. 378.

In Ward v. Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), this court stated, without identifying any precedent:

> "Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial de novo in the County Court of Common Pleas. We disagree. This 'procedural safeguard' does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance."

In North v. Russell, supra, however, this court quoted from Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972), language which is as applicable to

Ohio's mayor's court system as it was to Kentucky's police courts:

> "'The right to a new trial is absolute. A defendant need not allege error in the inferior court proceeding. If he seeks a new trial, the Kentucky statutory scheme contemplates that the slate be wiped clean. Ky.Rule Crim.Proc. 12.06. Prosecution and defense begin anew... The case is to be regarded exactly as if it had been brought there in the first instance.' Id., at 113, 92 S.Ct., at 1958."
>
> North Russell, supra, at 335, 96 S.Ct. at 2713.

There is no reason to treat Ohio's court system any differently than Kentucky's. If an alleged due process violation may be cured by a *de novo* appeal in Kentucky, the same should be so in Ohio, particularly in light of the policy considerations which support the having a local court handle minor cases, which will be discussed below. The Ohio court system, including the initial step of mayor's court, should be deemed by this court to comply with due process requirements of Article XIV of the U.S. Constitution.

OHIO'S COURT SYSTEM SHOULD BE PERMITTED TO RETAIN THE FLEXIBILITY TO HANDLE LOCAL VIOLATIONS LOCALLY, IN A MANNER PRESCRIBED BY THE OHIO LEGISLATURE.

The amici's second argument is one of public policy, which has been identified and approved in North v. Russell, 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976): Ohio's municipalities should have the opportunity of providing persons, cited under a municipal ordinance, a hearing of the charges against them locally.

As a consequence of the Sixth Circuit Court of Appeals' decision below, those municipalities which still seek to provide a local trial of the charges by the mayor of the municipality now face a lawsuit for violating a defendant's civil rights. This result deprives the municipalities of the State of Ohio, and people charged with local violations of law, with the right to have a local resolution of the case.

In North v. Russell, 427 U.S. 328, 336, 96 S.Ct. 2709, 2713, 49 L.Ed.2d 534 (1976), this court noted the policies supporting the court's decision had been identified in Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972). This language describing the policy is as applicable

to Ohio's mayor's court system as it was to Kentucky's police courts:

> "We went on to note that the justifications urged by States for continuing such tribunals are the 'increasing burdens on state judiciaries' and the 'interest of both the defendant and the State to provide speedier and less costly adjudications' than those provided in courts 'where the full range of constitutional guarantees is available...' Id., At 114, 92 S.Ct., at 1959. Moreover, state policy takes into account that it is a convenience to those charged to be tried in or near their own community, rather than travel to a distant court where a law trained judge is provided, and to have the option, as here, of a trial after regular business hours. We took note of these practical considerations in Colten:
>
> 'We are not persuaded, however, that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or less than trials conducted in a court of general jurisdiction in the first instance, as long as the latter are always available. Proceedings in the inferior courts

> are simple and speedy, and, if the results in Colten's case are any evidence, the penalty is not characteristically severe. Such proceedings offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own. He may also plead guilty without a trial and promptly secure a De novo Trial in a court of general criminal jurisdiction.' Id., at 118-119, 92 S.Ct., at 1961."
>
> North v. Russell, supra at 336, 96 S.Ct. at 2713. (Emphasis added.)

In the instant case, the Ohio system provided the respondent with more process than he would have otherwise been entitled had he been cited directly into municipal court. As noted in North (citing Colten), the respondent was able to learn of the City's case against him, and he was not required to disclose his case in the Mayor's court. Ultimately, respondent prevailed in the municipal court and had the charges against him dismissed. Ohio's court system worked as it was supposed to, and respondent was provided with due process of law.

CONCLUSION

The Sixth Circuit's decision improperly subjects municipalities which utilize a mayor's court in Ohio, as

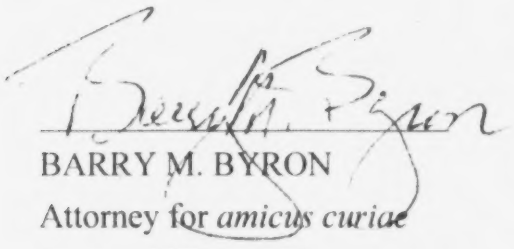
currently permitted under Ohio law, to a determination that a defendant has been deprived of due process rights. The prior determination of this court, that a *de novo* appeal does not cure the alleged procedural due process errors which are implicated when a mayor with executive authority acts as judge, is inconsistent with what has this court has permitted in North v. Russell, supra. North, supra, *sub silentio*, overruled the unsupported and unprecedented language in Ward v. Monroeville, supra, which stated that a subsequent appeal could not purge a proceeding which is alleged to have violated a defendant's due process rights.

As a matter of law, in Ohio, any defendant who goes before a mayor (who may or may not be the head of the municipal police department) is permitted to have the case heard, subsequently, by a neutral and detached judge or magistrate in the appropriate municipal or county court. There are many reasons why this system should be permitted, and several of these reasons have been identified by this court in cases which involved the State of Kentucky. North v. Russell, supra; Colten v. Kentucky, supra. This court should review the entire procedure which the entire Ohio court system provides, and determine that it provides due process to Ohio defendants who are hailed into a mayor's court.

Equally important, due process should mean the same thing in Ohio as it does in Kentucky; as of today, it does not

This court is urged to grant the petition for certiorari, reverse the Sixth Circuit's opinion below and allow Ohio's municipalities to operate their mayor's courts in the manner permitted by state law.

Respectfully submitted,



BARRY M. BYRON
Attorney for *amicus curiae*
Orange Village and
The Ohio Municipal League

APPENDIX

Selected provisions of the Ohio Constitution:

Ohio Constitution, Article XVIII, Section 3:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Ohio Constitution, Article XVIII, Section 7:

> "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

Selected provisions of the Ohio Revised Code:

Ohio Revised Code Section 1905.01(A):

> "(A) In all municipal corporations not being the site of a municipal court nor a place where a judge of the Auglaize county, Crawford county, Jackson county, Miami county, Portage county, or Wayne county municipal court sits as required pursuant to section 1901.021 of the Revised Code or by designation of the judges pursuant to section

1901.021 of the Revised Code, the mayor of the municipal corporation has jurisdiction, except as provided in divisions (B), (C), and (E) of this section and subject to the limitation contained in section 1905.03 and the limitation contained in section 1905.031 of the Revised Code, to hear and determine any prosecution for the violation of an ordinance of the municipal corporation, to hear and determine any case involving a violation of a vehicle parking or standing ordinance of the municipal corporation unless the violation is required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521. of the Revised Code, and to hear and determine all criminal causes involving any moving traffic violation occurring on a state highway located within the boundaries of the municipal corporation, subject to the limitations of sections 2937.08 and 2938.04 of the Revised Code."

Ohio Revised Code Section 1905.22, Appeals:

"Appeals from a mayor's court may be taken to the municipal court or county court having jurisdiction within the municipal corporation."

Ohio Revised Code Section 1905.23, Notice of Appeal:

> "Within ten days from the time a mayor renders judgment, the appellant shall file with the mayor's court a written notice of appeal designating the order or judgment appealed from and the court to which the appeal is taken.
>
> All further proceedings in mayor's court shall be stayed from the time of filing the notice of appeal with the mayor's court."

Ohio Revised Code Section 1905.24, Transcript:

> "Upon the filing of the notice of appeal, the clerk of the mayor's court shall make a certified transcript of the proceedings an deliver such transcript together with the original papers used on (sic) the trial, to the court to which the appeal is taken, within fifteen days from the rendition of the judgment appealed from.
>
> Upon receipt of the transcript and the papers mentioned in this section, the clerk of the court to which the appeal is taken shall file them and docket the appeal."

Ohio Revised Code Section 1905.25, Appeal; trial de novo:

> "An appeal from the mayor's court to the municipal court or county court shall proceed as a trial de novo."

Ohio Revised Code Section 2945.17, Right to Trial by Jury:

> "At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of one hundred dollars, the accused has the right to be tried by a jury."

Selected provisions of the Orange Village Charter:

From Article IV:

"SECTION 3. JUDICIAL POWERS.

> The Mayor shall have all the judicial powers granted to Mayors by the laws of Ohio. If the Mayor elects to conduct a Mayor's Court, Council may authorize compensation for the Mayor, which shall be in addition to the compensation provided by Article III, Section 8 of the Charter."

"SECTION 5. EXECUTIVE POWERS.

> (A) The Mayor shall be the chief executive officer of the Municipality. Except as

otherwise provided in this Charter, the Mayor shall

(i) Supervise the administration of the municipality's affairs;

(ii) Except for committees of Council, appoint such committees and their chairpersons as are necessary, and exercise control over all such committees and all departments of the municipality.

(iii) Be the chief conservator of the peace within the Municipality and cause all laws and ordinances to be enforced therein;

(iv) See that all terms and conditions imposed in favor of the Municipality or inhabitants in any franchise or contract to which the Municipality is a party are faithfully kept and performed;

(v) Recommend to Council such measures as are deemed necessary or appropriate for the welfare of the Municipality and keep Council advised of the condition and future of the Municipality;

(vi) Act as the official and ceremonial

Supreme Court, U.S.
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(3)

Case No. 99-522

In The Supreme Court of the United States

CITY OF MACEDONIA; JOSEPH MIGLIORINI, IN HIS OFFICIAL CAPACITY AS MAYOR AND JUDGE OF THE CITY OF MACEDONIA MAYOR'S COURT,
Petitioners,

v.

CHRISTOPHER DEPIERO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPPOSITION OF RESPONDENT TO MOTION AND BRIEF *AMICI CURIAE* OF ORANGE VILLAGE, OHIO, et al.

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I. The claim of *Amicus* Parties Orange Village and Ohio Municipal League that the case of *North v. Russell* overruled language in *Ward v. Village of Monroeville* which stated a *de novo* appeal of right cannot cure a due process violation, is not supported by any existing case law and is frivolous.

In their Brief (pp. 7, 13), Amicus parties Orange Village and Ohio Municipal League claim that this Court's decision in *North v. Russell*, 427 U.S. 328 (1976) overruled that part of *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), where the Court held that a criminal defendant is "entitled to a neutral and detached judge in the first instance" *Ward, supra* at 61-62, and that a trial *de novo* did not cure the constitutional denial of due process caused by the potential bias of a judge, *Ward*.

Far from overruling that part of *Ward v. Village of Monroeville, supra*, this Court distinguished the Kentucky system in *North v. Russell, supra*, where lay judges conducted trials and a convicted defendant was entitled to a trial *de novo* presided over by a lawyer-trained judge from the Ohio Mayor's Court system where a Mayor with wide executive powers presided over a trial. The issue in *North v. Russell , supra,* was not potential bias, as in *Ward v. Village of Monroeville, supra,* and as in the instant case, but whether a criminal defendant was entitled to be tried before a lawyer-trained judge in the first instance. Distinguishing between legal training as opposed to potential bias, this Court allowed a criminal defendant to be tried before a lay judge, so long as a convicted defendant was entitled as of right to a trial *de novo* before a lawyer trained judge. Nowhere in *North v. Russell, supra,* did the Court even remotely indicate that it was overruling any part of *Ward v. Village of Monroeville, supra*.

> Under *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 *** (1972), appellant argues that he is entitled to a lawyer-judge in the first instance. There the judge was also the mayor and the village received a substantial portion of its income from fines imposed by him

> as judge. Similarly in *Tumey v. Ohio*, 273 U.S. 510 *** (1927), the challenge was directed not at the training or education of the judge but at his possible bias due to interest in the outcome of the case, because as in *Monroeville* he was both mayor and judge and received a portion of his compensation directly from the fines. Financial interest in the fines was thought to risk a possible bias in finding guilt and fixing the amount of fines and the court found that potential for bias impermissible.
>
> ***Our concern in prior cases with judicial functions being performed by nonjudicial officers has also been directed at the need for independent , neutral and detached judgment, not at legal training.
>
> *North v. Russell*, 427 U.S. at 337

Since *North v. Russell, supra,* this Court has reaffirmed the legal principle that a criminal defendant is entitled to a neutral and detached judge in the first instance and a trial de novo does not cure the constitutional denial of due process caused by a potentially biased judge.

> [I]n *Ward v. Village of Monroeville* *** the possibility of a later *de novo* trial in another court was held to be of no constitutional relevance because the defendant was "entitled to a neutral and detached judge in the first instance."
>
> *Connally v. Georgia*, 429 U.S. 245, 249-250 (1977)

> Appellee correctly points out that in *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct.80, 34 L. Ed.2d 267 (1972), we held that the availability of a trial *de novo* before an unbiased judge did not remove the constitutional infirmity in an original trial before one who impartiality was impaired.
>
> *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 247, f. 9 (1980)

> [D]ue process requires a "neutral and detached judge in the first instance," *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, 93 S.Ct. 80, 84, 34 L. Ed.2d 267 (1972)*** Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator. 409 U.S., at 61, 93 S.Ct. At 83.
>
> *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 617-18 (1993)

In light of *Connally v. Georgia, supra; Marshall v. Jerrico, Inc. supra;* and *Concrete Pipe and Products v. Construction Laborers Pension Trust, supra,* reaffirming the holding in *Ward v.*

Village of Monroeville, supra that a criminal defendant is entitled to a "neutral and detached judge in the first instance" and that a trial *de novo* does not cure the constitutional denial of due process in subjecting a person to a potentially biased judge and with no case law to the contrary, the claim of *Amici* Orange Village and Ohio Municipal League that *North v. Russell, supra* overruled in part *Ward v. Village of Monroeville, supra,* is devoid of any legal basis and is frivolous.

II. The court structure in the Commonwealth of Kentucky today does not bear any resemblance of what *Amici* Village of Orange and Ohio Municipal League claim it to be.

Contrary to the claim of *Amici* Village of Orange and Ohio Municipal League, Courts in the Commonwealth of Kentucky today do not hear cases in a local decentralized manner as was the situation in *North v. Russell, supra.* Even at the time of *North v. Russell, supra,* this Court recognized that the days of the police courts were to end on January 1, 1978 as such courts were being replaced with centralized District Courts. *North v. Russell,* 427 U.S. at 331, f. 3.

The system which *Amici* claim in the brief to exist in Kentucky and seek to duplicate in Ohio with Mayor's Courts, where police courts with lay judges conducted trials followed by a trial *de novo* appeal as of right before a lawyer trained judge, has long since ended. Today, under Kentucky Constitution §115, "Appeals shall be upon the record and not by trial de novo." Parenthetically, Kentucky Constitution §122 provides that "No district judge shall serve who has not been a licensed attorney for at least two years."

III. An Ohio Mayor of a Municipality not the site of a Municipal Court may still hear and decide cases on a local level provided that the Municipality complies with the Constitution of the United States.

Contrary to the assertion made by *Amici* Orange Village, it still remains free to have its Mayor

preside as Judge of the Mayor's Court and adjudicate cases, provided it first amends it City Charter and divests the Mayor of his wide executive powers which include Chief Executive Officer responsible for the financial condition of the Municipality and Chief Law Enforcement Officer responsible for enforcement of municipal and state law. With the divestiture of the Mayor's wide executive powers and its transfer of such power to a City Manager, the Mayor would be functioning in a judicial capacity as the Mayor of Xenia did in *Dugan v. Ohio*, 277 U.S. 61 (1928), where this Court upheld a system where a Mayor with diluted executive powers presided over a Mayor's Court and which case was followed by the Court of Appeals in the instant case. Similarly, the Mayor of Orange Village with newly diluted executive powers would then be functioning as did the judge in *North v. Russell, supra.*, with a lack of wide executive powers and the accompanying potential bias, just as the old Kentucky system *Amici* desires. The Kentucky system *Amici* desires already exists in Ohio in those Municipalities where a city manager is the Chief Executive Officer and the Mayor presides over Mayor's Court.

What *Amici* Orange Village and Ohio Municipal League are requesting as a matter of "public policy" is for this Court to overrule that part of *Ward v. Village of Monroeville, supra*, which held that a criminal defendant is entitled to a "neutral and detached judge in the first instance" and allow even the most egregious examples of bias, both in appearance (chief law enforcement officer presiding over a trial and issuing warrants) and occurrence ("This is one of my guys, he's a good officer and I have no reason to doubt him" *Rose v. Village of Peninsula*, 875 F. Supp. 442, 452, f. 7) to occur so long as a trial *de novo* was available. This shocking result would be the end of Due Process in the United States of America as we know it.

Nearly 800 years ago, the *Magna Carta* promised that "No sheriff, constable, coroners, or

other bailiffs of ours shall hold the pleas of the crown" Magna Carta, (1215), ¶24. Finally, in 1999, Ohio, the last remaining state where law enforcement officers simultaneously sat as judges has ended. The decision in this case by the United States Court of Appeals for the Sixth Circuit striking down the Ohio Mayor's Court system where a Mayor with wide executive powers presides over a Mayor's Court is consistent with the foundational principles of Due Process established in the *Magna Carta* and the Fifth and Fourteenth Amendments to the Constitution of the United States and consistently followed by this Court.

For the reasons provide in his Brief in Opposition and in this Opposition to Motion and Brief of *Amici Curiae*, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

Melissa Graham-Hurd

MELISSA GRAHAM-HURD
Attorney for Respondent

CERTIFICATION OF SERVICE

Counsel for the Respondent hereby certifies that three copies of the Opposition of Respondent to Motion and Brief Amici Curiae were sent by regular U.S. mail on this 24th day of November, 1999 to the following:

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Melissa Graham-Hurd

MELISSA GRAHAM-HURD

head of the Municipality;

(vii) Execute all contracts, conveyances, evidences of indebtedness and all other instruments to which the Municipality is a party;

(viii) Have custody of the seal of the Municipality and affix it to all official documents, but the absence of the seal shall not affect the validity of any such instrument; and

(ix) Perform such other duties as are conferred or required by this Charter, or by any ordinance or resolution of Council, or by the general laws of the State of Ohio not inconsistent therewith.

The Mayor shall be recognized as the official and ceremonial head of the municipal government by the Governor of Ohio for military purposes, and by the courts for the purposes of serving civil process.

(B) The Mayor shall have the right to discipline and terminate the employment of any officer or employee whom the Mayor appoints in the following manner:

(i) With respect to the Police Chief, police officers and patrolmen, to discharge from employment, suspend, transfer, reduce in rank or otherwise discipline. Said action shall be final unless the person so disciplined requests a review of the action in writing to the Council President within ten (10) days of the effective date of the Mayor's action. The request for review shall contain in addition to all points on which the officer relies in support of his or her claim and shall be placed on the agenda for the meeting of Council either next following the expiration of such ten (10) day period or within twenty (20) days. All interested persons may be present to present information to the Council. A vote of five (5) members of Council shall be necessary to reverse the Mayors's action;

(ii) With respect to all other non-elected officers and employees over whom the Mayor has the power to appoint, the power to discipline, suspend, transfer,

reduce in rank or discharge from employment.

(C) Except as otherwise specifically provided in subparagraph B(i) all actions taken pursuant to Section 5(B) shall be final and conclusive, and no right of appeal shall be available."

From Article V:

"SECTION 1. GENERAL PROVISIONS.

The Municipality shall have a Law Director, a Treasurer, an Architect, an Engineer, a Tax Administrator, and the following departments and commissions: Police, Fire, Building, and Planning and Zoning. Council shall provide by ordinance for the organization and duties thereof not provided for by this Charter.

Council may by ordinance establish new offices, departments, boards, and commissions or divisions thereof. The Mayor shall have the power to appoint, except for the Law Director, all officers and employees of said offices, departments, boards and commissions or divisions thereof subject to confirmation by a vote of four (4) members of Council; provided, that, subject to any contract rights of such officers and employees, Council may combine or abolish such offices, departments,

boards and commissions or divisions thereof as it may necessary or desirable and may authorize one person to be the head of two or more departments, boards or commissions or divisions thereof."

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No. 99-522

In The
Supreme Court of the United States

CITY OF MACEDONIA; JOSEPH MIGLIORINI, IN HIS OFFICIAL CAPACITY AS MAYOR AND JUDGE OF THE CITY OF MACEDONIA MAYOR'S COURT,
Petitioners,

v.

CHRISTOPHER DEPIERO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a person is denied the Fourth and Fourteenth Amendment right against issuance of a warrant when the determination of probable cause and issuance of such warrant is made by a law enforcement officer.

2. Whether a person is denied Due Process of Law under the Fourteenth Amendment to the United States Constitution by being subjected to adjudication and sentencing by a judge who is simultaneously a law enforcement officer.

3. Whether a person is denied Due Process of Law under the Fourteenth Amendment to the United States Constitution by being subjected to adjudication and sentencing by a Mayor of a Municipality acting as judge of a Mayor's Court when such Mayor is the Chief Executive Officer responsible for the financial condition of the municipality or the Chief Law Enforcement Officer of such municipality.

4. Whether a Mayor of a Municipality who is granted final and unfettered discretion by state law and municipal charter as to whether or not to hold and preside over a Mayor's Court is establishing official policy to render the municipality liable under *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978) and its progeny.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

City of Macedonia; Joseph Migliorini, in his official capacity as Mayor and Judge of the City of Macedonia Mayor's Court,

Petitioners/Defendants below,

and

Christopher DePiero,

Respondent/Plaintiff below

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BRIEF IN OPPOSITION OF RESPONDENT

PREFACE

"No man is allowed to be a judge in his own cause, because his interest would probably bias his judgment, and, probably, corrupt his integrity."

Publius, The Federalist, No. 10 (Madison)

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

Publius, The Federalist, No. 47 (Madison)

"*** the general liberty of the people can never be endangered from [the courts of justice]; I mean so long as the judiciary remains truly distinct from both the legislative and the executive. For I agree that 'there is no liberty if the power of judging be not separated from the legislative and executive powers. And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments;'"

Publius, The Federalist, No. 78 (Hamilton)

"You honor the constitution *** when you take a constitutional question to court; *** The Constitution is not and never could be defined only by judges. ***By spreading the responsibility for upholding the constitution, our forefathers have enlisted a legion of defense for our charter."

Justice Sandra Day O'Connor, Address to the Akron and Stark County Bar Associations' Commemoration of the Bicentennial of the United States Constitution, June 5, 1987.

"If judges were to become the stooges of police departments, it would be the end of freedom as we know it. In those countries where the judiciary is the servant of the police or the military, a dictatorship exists or is in the process of arising. Civil rights and civil liberties are clubbed and shot down in the streets. And die there."

Charles Levendosky, "Federal appeals courts in crisis–justice is delayed", *Casper (Wyo.) Star-Tribune*, October 10, 1999.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App.1-46) is reported at 180 F.3d 770. The opinions of the District Court (Pet. App. pp. 47-95) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1999. The Petition for Writ of Certiorari was sent by U.S. Mail on September 21, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment and Due Process Clause of the Fourteenth Amendment to United States Constitution and Ohio Revised Code § 1905.01 are involved in this case. (Pet. App. pp. 96-98, 103-110)

STATEMENT OF THE CASE

A. Underlying Facts

This case arises out of a civil action brought by Respondent, Christopher DePiero, under 42 U.S.C. § 1983 against Petitioners, City of Macedonia and Joseph Migliorini, in his official capacity as Mayor and Judge of the City of Macedonia Mayor's Court and an additional law enforcement officer who is not the subject of the Petition. In his Civil Rights Action, Respondent DePiero alleged a violation of his Constitutional Rights under the Fourth and Fourteenth Amendments to the United States Constitution. Specifically relevant to the Petition, Respondent DePiero brought federal claims against Petitioners alleging he was denied his right to Due Process of Law under the Fourteenth Amendment to the United States Constitution by being subjected to adjudication and sentencing in the City of Macedonia Mayor's Court by Petitioner Migliorini because Migliorini, as Mayor of the City of Macedonia, is simultaneously a law enforcement officer and the Chief Executive Officer responsible for the financial condition of the municipality. In addition, Respondent DePiero brought a claim for denial of his rights under the Fourth and Fourteenth Amendments to the United States Constitution due to Petitioner Migliorini's determining probable cause and issuing an arrest warrant, as Petitioner Migliorini is a law enforcement officer under State Statute, City Charter and Ohio Supreme Court case law.

On December 4, 1994, a law enforcement officer for the City of Macedonia placed a parking citation on Respondent DePiero's automobile alleging a violation of a codified ordinance of the City of Macedonia. Petitioner City of Macedonia and the law enforcement officer would later concede that Respondent DePiero was not guilty of the charge made in

the citation. Ohio Revised Code §2935.26(B)(4) mandates that all citations contain "An order for the offender to appear at a stated time and place". Ohio Revised Code § 2935.26(B)(6) requires "***notice that the offender is required to do one of the following and that he may be arrested if he fails to do one of them: (a) Appear at the time and place stated in the citation***,". Rule 4(C)(2) of the Ohio Rules of Criminal Procedure requires that the summons contain an order for the defendant "to appear at a stated time and place and inform him that he may be arrested if he fails to appear at the time and place stated in the summons". However, the citation used by Petitioner City of Macedonia and the law enforcement officer did not contain any such information as required under Ohio law. The citation used by Petitioner City of Macedonia contained no information as to how a defendant may contest the charges filed against him or her. Because the citation used by Petitioner City of Macedonia did not contain an order to appear in Court, nor state when to appear to answer such charge, nor contain information on how a person may contest the charge, Respondent DePiero took no action.

Rule 4(D)(3) of the Ohio Rules of Criminal Procedure provides that in a criminal case, the permitted methods for service of process for the summons from which a court acquires personal jurisdiction over a defendant are personal service, residential service by leaving it at the defendant's usual place of residence with some person of suitable age and discretion then residing therein, or by mailing to the defendant's last known address by certified mail return receipt requested. On January 12, 1995, the Clerk of the City of Macedonia Mayor's Court allegedly sent out a summons to Respondent's home address by regular U.S. Mail only, allegedly notifying him to appear in the City of Macedonia Mayor's Court on January 23, 1995. Respondent DePiero never received such summons.

Because the summons issued was not personally served on Respondent DePiero, nor served by residential service, nor by certified mail with return receipt requested, Petitioners City of Macedonia and Migliorini lacked personal jurisdiction over Respondent DePiero to proceed with the case in the City of Macedonia Mayor's Court. Despite his lack of personal jurisdiction over Respondent DePiero, Petitioner Migliorini, acting as judge of the City of Macedonia Mayor's Court, issued a bench warrant on February 7, 1995 for Respondent DePiero's arrest for failure to appear in the City of Macedonia Mayor's Court.[1]

On March 6, 1995, a law enforcement officer from Boston Heights, Ohio stopped Respondent DePiero on an unrelated traffic stop and informed Respondent that an arrest warrant had been issued against him. The law enforcement officer from Boston Heights, Ohio required Respondent DePiero to drive his vehicle in caravan with the police car to the police department of Boston Heights where he was held until unknown law enforcement officers from the City of Macedonia transported Respondent DePiero in handcuffs to the City of Macedonia police department. Respondent DePiero was informed by a law enforcement officer of the City of Macedonia police department that he either had to post a $250.00 cash bond or would be kept in the City of Macedonia jail until his

---

[1] "It is axiomatic that for a court to acquire jurisdiction there must be a proper service of summons or an entry of appearance, and a judgment rendered without proper service or entry of appearance is a nullity and void.*** It is thus well-settled that a decision rendered by a court without jurisdiction is unauthorized by law and amounts to usurpation of judicial power."

State of Ohio, ex rel. Ballard v. O'Donnell, 50 Ohio St. 3d 182, 183-84, 553 N.E.2d 650, 652 (1990)

arraignment in the City of Macedonia Mayor's Court. Respondent DePiero posted a $250.00 cash bond and was released by the City of Macedonia police department. Respondent DePiero, unable to persuade anyone from the City of Macedonia police department to provide him a ride back to obtain his car, walked more than six miles in a rainstorm to obtain his vehicle which was left at the Boston Heights police station.

On April 3, 1995, Respondent appeared in the City of Macedonia Mayor's Court and entered a plea of "not guilty" to both the parking and criminal contempt charge filed against him. On April 17, 1995, a trial was conducted in the City of Macedonia Mayor's Court on the parking violation complaint and criminal contempt charge wherein Petitioner Migliorini presided as Judge. Even though both Petitioner City of Macedonia and the complaining law enforcement officer would later concede that Respondent was not guilty of the parking charge filed against him, Petitioner Migliorini found Respondent guilty of the parking charge filed. Even though the City of Macedonia Mayor's Court lacked personal jurisdiction over Respondent DePiero due to lack of service in conformity with the Ohio Rules of Criminal Procedure and Ohio Revised Code and thus lacked even probable cause to find that Respondent had failed to appear in court, Petitioner Migliorini nevertheless found Respondent DePiero guilty of criminal contempt for failing to appear. Petitioner Migliorini imposed a fine of $50.00 on the parking citation and a $100.00 fine on the criminal contempt charge. Respondent DePiero timely filed a Notice of Appeal to the Cuyahoga Falls Municipal Court with the Clerk of the City of Macedonia Mayor's Court. Pursuant to Ohio Revised Code §1905.25, the timely filing of a notice of appeal in a Mayor's Court vacates the conviction and the proceedings in the Municipal or County Court having

jurisdiction are *de novo*. On June 20, 1995, upon motion of the prosecutor for the City of Macedonia, Judge William Pike of the Cuyahoga Falls Municipal Court dismissed both cases against Respondent DePiero.

B. Proceedings Below

On November 14, 1995, Respondent DePiero commenced his civil rights case under 42 U.S.C.§1983 against Petitioners City of Macedonia and Joseph Migliorini, in his official capacity as Mayor and Judge of the City of Macedonia Mayor's Court. The three counts of his complaint relevant to this Petition alleged: 1) Denial of Due Process by Petitioner Migliorini sitting as Judge in the trial of Respondent DePiero's case and by Ohio Revised Code § 1905.01 which authorizes a Mayor of a Municipality to sit as Judge and adjudicate and sentence in a criminal case although such Mayor is simultaneously Judge and the Chief Executive Officer responsible for the financial condition of the municipality and Chief Law Enforcement Officer responsible for enforcement of federal, state and municipal laws (Counts I and II); and 2) Denial of Respondent DePiero's right under the Fourth and Fourteenth Amendments by the determination of probable cause and issuance of an arrest warrant by Petitioner Migliorini because Migliorini is a law enforcement officer by State Statute, City Charter and Ohio Supreme Court case law and was therefore not a neutral and detached judicial officer. (Count III)

On June 19, 1997, the United States District Court in a Memorandum and Opinion denied Respondent DePiero summary judgment on Counts I and II of his complaint and *sua sponte* dismissed count III. In dismissing Count III of Respondent DePiero's complaint, the trial court held that the requirement that probable cause and issuance of an arrest

warrant be determined by a judicial officer who is "neutral and detached" from law enforcement does not apply to the issuance of a bench warrant and that Petitioner Migliorini was a neutral and detached judicial officer, although Petitioner Migliorini is, in accordance with the City Charter, State Law and Ohio Supreme Court case law, a law enforcement officer.

After additional cross motions for summary judgment were filed, the trial court in a Memorandum of Opinion and Order on February 18, 1998 granted Petitioners City of Macedonia and Migliorini summary judgment on Counts I and II of Respondent DePiero's complaint. In granting summary judgment to Petitioners, the trial court held that "***the test for determining whether a judge is neutral and detached for purposes of due process is not the same test applied under the Fourth Amendment for determining whether an individual is a neutral and detached magistrate for purposes of issuing warrants (*i.e.*, that the person be neutral and detached from law enforcement)" and that there was no Due Process requirement of a person being "neutral and detached" from law enforcement to preside as judge over a trial. In addition, the trial court held that even if a Mayor had stated from the bench, "this is one of my guys, he's a good officer and I have no reason to doubt him" it would not with certainty deny Due Process to a defendant but that "this Court would be inclined to conclude that a mayor is partial to the word of a ticketing officer." Respondent filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit.

On June 23, 1999, the United States Court of Appeals reversed the District Court on the three counts of Respondent DePiero's complaint that are relevant to the Petition filed by City of Macedonia and Migliorini. In reversing the District Court, the Court of Appeals held that the wide level of executive powers and administrative authority vested in

Petitioner Migliorini resulted in "two practically and seriously inconsistent positions, one partisan and the other judicial" and denied Respondent DePiero Due Process of Law and that Ohio Revised Code §1905.01, although not unconstitutional on its face, was violative of Due Process when the Mayor is vested with wide executive powers. The Court of Appeals also held that the determination of probable cause and the issuance of an arrest warrant must be made by a person who is neutral and detached from law enforcement and that Petitioner Migliorini's wide executive powers and administrative responsibilities precluded him from presiding over Mayor's Court, and thus, his determination of probable cause and issuance of an arrest warrant against Respondent DePiero was a nullity. In addition, the Court of Appeals held that Petitioner Migliorini had final policymaking authority under State law in deciding whether to hold and how to structure a mayor's court and that Petitioner City of Macedonia was therefore not immune for Petitioner Migliorini's deprivation of Respondent DePiero's right to Due Process.

ARGUMENT

I. A person who is a law enforcement officer is Constitutionally disqualified *per se* from sitting as Judge and performing judicial functions.

Petitioner Migliorini is a law enforcement officer under the City of Macedonia Charter[2], State Law[3], and Ohio Supreme Court case law[4]. A person who is a law enforcement officer is constitutionally disqualified under the Fourth and Fourteenth Amendments from performing any judicial functions which would include the determination of probable case and issuance of a warrant or presiding over a court and adjudicating and sentencing in any criminal case.

This Court has consistently held that the guarantee of Due Process in the Constitution of the United States requires in any court where the Constitution of the United States is the Supreme Law, that a judge or magistrate must be neutral and detached from law enforcement and that a person who is a law

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[2] "The Mayor shall be the chief executive officer of the Municipality. He shall: *** 4. Be chief conservator of the peace and cause all law to be enforced."

Article III, § 3.03(4), City of Macedonia Charter

[3] "'Law enforcement officer' means any of the following: A mayor, in the mayor's capacity as chief conservator of the peace within the mayor's municipal corporation."

Ohio Revised Code § 2901.01(A)(11)(c)

[4] "The mayor, as the chief executive of the city, is responsible for law and order in the city and for the enforcement of the city ordinances and all criminal laws of the state and the United States."

In re Removal of Taylor, 172 Ohio St. 394, 399, 176 N.E. 2d 214, 217 (1961)

enforcement officer, as is Petitioner Migliorini, is not a neutral and detached judicial officer and is constitutionally disqualified ***per se*** from simultaneously sitting as judge and performing judicial functions. See, *Johnson v. United States,* 333 U.S. 10, 14-15 (1948); *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *United States v. United States District Court, E.D. of Mich.,* 407 U.S. 297, 317 (1972)("The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute."); *Shadwick v. City of Tampa,* 407 U.S. 345, 350 (1972)("Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement."); *Gerstein v. Pugh,* 420 U.S. 103, 117-8 (1975); *North v. Russell,* 427 U.S. 328, 337 (1976)("Our concern in prior cases with judicial functions being performed by nonjudicial officers has also been directed at the need for independent, neutral, and detached judgment, not at legal training. See, Coolidge v. New Hampshire***"); *United States v. Leon,* 468 U.S. 897, 917 (1984)("Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular prosecutions."); *Press Enterprises Co. (II) v. Superior Court,* 478 U.S. 1, 10 (1986)("Although grand jury proceedings have traditionally been closed to the public and the accused, preliminary hearings conducted before neutral and detached magistrates have been open to the public."[emphasis added]).

Petitioner Migliorini's role as the Chief Law Enforcement Officer for the City of Macedonia, with the express duty to see that all laws are enforced, is enough by itself to constitutionally disqualify him from acting as Judge of the City of Macedonia Mayor's Court and from performing any judicial function.

II. The Petitioners incorrectly characterize the determination of probable cause and issuance of a bench warrant as a perfunctory act.

The petitioners' assertion that the determination of probable cause and issuance of a bench warrant is a ministerial function (Pet. pp. 10, 17-21) is incorrect as evidenced not only by the federal appellate cases cited by Petitioners, but by additional federal case law. The facts of this case clearly and conclusively establish that the determination of probable cause and issuance of a bench warrant is not a perfunctory act.

Petitioners are correct that the issuance of a bench warrant based upon a defendant's failure to appear does not require the judge or magistrate to appear before a clerk who is neutral and detached from law enforcement and obtain such warrant based upon oath or affirmation. However, this truism is based upon.the presumption that the person who is acting as judge or magistrate and issuing the bench warrant for failure to appear is neutral and detached from law enforcement in the first place as so indicated by federal case law. Thus, while Petitioners cite *United States v. Spencer,* 684 F.2d 220 (2nd Cir. 1982), *cert. denied,* 459 U.S. 1109 (1983) to claim that the issuance of a bench warrant is different from an arrest warrant, the Court in *Spencer, supra,* made clear that the issuance of a bench warrant requires a finding of probable cause by a neutral and detached judge or magistrate.

> "He claims that the bench warrant upon which the search was predicated was issued without a determination of probable cause.*** In this case a New York City criminal court judge issued the bench warrant when appellant failed to appear in court in connection with misdemeanor charges on which he had previously been arraigned. *** The decision of the New York City

> criminal court judge to issue a bench warrant constituted a finding made by a neutral magistrate that Spencer had failed to appear in a pending criminal matter. *** Thus, the presence of the police in the defendant's room was pursuant to a direction made by a neutral magistrate." *United States v. Spencer, supra,* at 222-3

Similarly, the United States Court of Appeals for the Third Circuit has held that probable cause for the issuance of a bench warrant must be made by a "neutral and detached" judicial officer.

> "Pursuant to the indictment, a magistrate issued a bench warrant that same day***
> This "reasonable certainty" requirement both insures that a sufficient showing of probable cause has been made to the executing officer. Because the police are directly "engaged in the often competitive enterprise of ferreting out crime," the fourth amendment requires "that ... inferences be drawn [instead] by a neutral and detached magistrate..." *Johnson v. United States,* 333 U.S. 10, 14, 68 S. Ct. 367, 369 92 L.Ed.436 (1948)"
> *United States v. Doe,* 703 F.2d 745, 746-7 (3rd Cir. 1983)

See also, *Smith v. Tolley,* 960 F. Supp. 977, 991 (E.D. Va. 1997)(following *United States v, Spencer, supra,* holding that bench warrant was valid since determination of probable cause for failure to appear was made by a neutral magistrate.)

Petitioners citing of *United States v. Bennett,* 170 F.3d 632 (6th Cir. 1999)(Pet. P. 20) as being irreconcilable with the Court's decision in this case is also erroneous. In *United States v. Bennett, supra,* the defendant challenged whether the clerk of

the county circuit court was sufficiently neutral and detached from law enforcement. While the Court in *United States v. Bennett, supra,* upheld the issuance of a warrant made by a county circuit court clerk who ran a partisan race to be elected to her post, belonged to the same political party as the Commonwealth's Attorney and had attended some of the same campaign fundraisers as the Commonwealth's Attorney, the Court of Appeals made clear that if such clerk was not sufficiently neutral and detached from law enforcement, the warrant would violate the Fourth and Fourteenth Amendments to the United States Constitution. "By way of clarification, were Ms. Goad not considered neutral or detached, this would necessitate a finding that the state search warrant was constitutionally defective." *United States v. Bennett,* 170 F.3d 632, 637, f. 2 (6th Cir. 1999).

In order to issue a bench warrant for failure to appear, there must be a finding of probable cause that the defendant not merely failed to appear, but was served in accordance with the court rules and statutes which provide the court with personal jurisdiction over the defendant. If there is a failure of service of process due to non-compliance by the court with binding state statutes and court rules as to how service of process may be made, there can never be probable cause against a person for failure to appear. While Petitioner Migliorini claims the issuance of a bench warrant to be a perfunctory act and asks this Court to sanction his action, he fails to properly reveal to this Court that he never had personal jurisdiction over Respondent DePiero at the time he allegedly determined probable cause and issued the bench warrant for Respondent DePiero's alleged failure to appear. The service made by Petitioners City of Macedonia and Migliorini was invalid under controlling and binding Ohio law and Ohio Court Rules and Petitioner

Migliorini cannot deny nor rebut such fact.[5]

Petitioner Migliorini asks this Court to hold that the issuance of a bench warrant is a perfunctory act, although he lacked personal jurisdiction over Respondent DePiero but nevertheless proceeded to issue a bench warrant against Respondent DePiero. Petitioner Migliorini lacked personal jurisdiction over Respondent DePiero due to lack of service of process but still found probable cause and issued a bench warrant and proceeded to act as judge and find Respondent DePiero guilty of criminal contempt for failure to appear. This tyrannical act by Petitioner Migliorini of issuing a bench warrant for failure to appear against Respondent DePiero when Petitioner Migliorini lacked personal jurisdiction over Respondent DePiero, and which resulted in his arrest and detention, should by itself eliminate any scintilla of doubt that the issuance of a bench warrant is not a perfunctory act and that a person who is a law enforcement officer can never be given the authority to sit as judge and determine probable cause and issue <u>any</u> warrant: bench warrant, arrest warrant or search warrant.

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[5] Although Petitioners cite *In re Grand Jury Proceedings Harrisburg Grand Jury 79-1*, 658 F.2d 211 (3rd Cir. 1981) to claim that the issuance of an arrest warrant for an individual who has failed to appear in court after summons was issued by the court clerk is a perfunctory act akin to a ministerial act, it can be noted that, unlike the Mayor's Court which Petitioner Migliorini presided over, the Court in *In re Grand Jury, supra,* had personal jurisdiction over the alleged contemnor as a result of valid service of process and, thus, probable cause to issue a bench warrant for failure to appear.

"An FBI agent served this second subpoena on McNabb in Florida, on March 14. *** Thus, McNabb's simple failure to appear provided the court with probable cause to issue a bench warrant." *In re Grand Jury Proceedings,* 658 F. 2d at 212, 215

III. The Petitioners incorrectly claim that the decision of the Court of Appeals is in conflict with a decision from the Ohio Supreme Court.

While Petitioners claim that the decision issued by the Court of Appeals in this case is in conflict with the decision of the Ohio Supreme Court in *Village of Covington v. Lyle*, 69 Ohio St. 2d 659, 433 N.E.2d 597 (1982), a close examination of *Village of Covington, supra*, reveals that such case defies the Supremacy Clause of the United States Constitution as it conflicts with this Court's decision in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

In *Ward v. Village of Monroeville, supra*, this Court struck down the Ohio Mayor's Court system involving a Mayor of a Village acting as judge and presiding over a contested case. In *Ward, supra*, this Court found that:

> "[t]he Mayor of Monroeville has wide executive powers and is chief conservator of the peace. He is the president of the village council, presides at all meetings, votes in case of tie, accounts annually to the council respecting finances, fills vacancies in village offices and has general overall supervision of village affairs." *Ward*, 409 U.S. at 58

Ten years after this Court's decision in, *Ward, supra*, the Ohio Supreme Court issued its decision regarding the operation of Mayor's Courts in Ohio and the constitutional right to Due Process of Law. In *Village of Covington v. Lyle, supra*, the Ohio Supreme Court found that Mayors in Ohio had "diluted executive authority", rather than "wide executive authority" as this court had so found only ten years earlier. This was despite the fact that the State statutes covering a Mayor's executive powers and responsibilities and accompanying duties for the financial condition and law enforcement in Ohio had not changed in the ten years since *Ward, supra*, as so found by the

United States District Court in *Rose v. Village of Peninsula*, 875 F. Supp. 442 (N.D. Ohio 1995).

> "The Ohio statutes that today delineate the expanse of Mayor Ruoff's executive authority are the same statutes as those that defined the village mayor's authority in *Ward*. Mayor Ruoff's executive authority is not diluted, as was the mayor's executive authority in Dugan." *Rose v. Village of Peninsula*, 875 F. Supp. 442, 450 (N.D. Ohio 1995)

The Ohio Supreme Court in *Village of Covington v. Lyle*, 69 Ohio St. 2d at 661, 433 N.E.2d at 599 then relied upon and cited Justice White's **dissenting** opinion in *Ward, supra* and took the case-by-case approach that the dissent in *Ward, supra*, had advocated. By citing a dissenting opinion as the basis for upholding the Mayor's Court structure in Ohio, the Ohio Supreme Court issued a decision contrary to the binding precedent that a decision of this Court has on all state judges.[6] In addition, the Ohio Supreme Court in *Village of Covington v. Lyle*, 69 Ohio St.2d at 663, 433 N.E.2d at 600, viewed this Court's holding in *Ward, supra*, that "Petitioner is entitled to a neutral and detached judge in the first instance" as *obiter dicta*, even though this Court one year after *Ward, supra*, and nine years before *Village of Covington, supra*, reaffirmed such holding in *Gibson v. Berryhill*, 411 U.S. 564 (1973).

Village of Covington v. Lyle, supra, is in conflict with the decision of the Court of Appeals in this case only because *Village of Covington, supra*, violates the Supremacy Clause of Article VI of the United States Constitution. *Village of Covington, supra*, has been rejected by the United States

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6 "This constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land; and the judges in every state shall be bound thereby***", Article VI, United States Constitution. (emphasis added)

District Court judges in Ohio who have applied it in cases before such courts. See, *Rose v. Village of Peninsula*, 839 F. Supp. 517, 523 (N.D. Ohio 1993)(Bell, J.)("This court believes that the dissenters in *Covington* have the more correct interpretation of *Ward*."); *Rose v. Village of Peninsula*, 875 F. Supp. 442, 453 (N.D. Ohio 1995)(O'Malley, J.)(This Court finds *Covington* unpersuasive.") A state supreme court decision that defies the Supremacy Clause of the United States Constitution should not serve as the basis for this Court hearing the Petition of City of Macedonia and Migliorini.

Petitioners also claim that the Court of Appeals decision in this case conflicts with this Court's previous decisions in *Tumey v. Ohio*, 273 U.S. 510 (1927); *Dugan v. Ohio*, 277 U.S. 61 (1928); and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) because the Court found that Petitioner Migliorini's broad reach of executive powers and sweeping administrative responsibilities were enough by themselves to constitutionally disqualify him from acting as judge of the Mayor's Court. However, in so holding, the Court of Appeals directly quoted this Court's decisions in *Tumey, supra*, and *Ward, supra*, that Petitioner Migliorini was in "two practically and seriously inconsistent positions, one partisan and the other judicial." *Ward*, 409 U.S. at 60 quoting *Tumey*, 273 U.S. at 534, by his extensive executive powers and administrative responsibilities. The rationale of the Court of Appeals is consistent with this Court's prior holdings in *Tumey*, 273 U.S. at 532 which was followed in *Ward*, 409 U.S. at 57 that:

> "**Every** procedure which would offer a possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." (emphasis added)

In addition, the rationale of the Court of Appeals in this case, that Petitioner Migliorini's dual inconsistent powers were sufficient enough by themselves to deny Respondent DePiero Due Process, is consistent with that of the Court of Appeals in *Commonwealth of the Northern Mariana Islands v. Kaipat*, 94 F.3d 574 (9th Cir. 1996). While denying the constitutional challenge to the Court structure, the Court of Appeals found:

> that this case is closer to Dugan than to Tumey, and that Kaipat has not shown a violation of his federal constitutional rights since the judge had no pecuniary interest in the fine and held no other position that could reasonably warrant a fear of partisan influence on his judgment.*** judges have no executive functions, only judicial functions, judges are not responsible for raising revenue;*** CNMI judges are just judges; they have no other governmental position, and no executive responsibilities. Their functions are entirely judicial.*** Unlike the mayor of North College Hill in *Tumey* and the mayor of Monroeville in *Ward*, CNMI judges have no responsibility for the financial condition of the Northern Mariana Islands and no official motive to improve it. *** Nor do CNMI judges hold any other position that permits them to control municipal or state policy with respect to establishing courts and enforcing particular laws***
>
> *Commonwealth of Northern Mariana Islands v. Kaipat*, 94 F.3d at 575, 580-81 (emphasis added)

"**Every** procedure which would offer a possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused***", *Tumey, supra; Ward, supra*, (emphasis added) means every time a person occupies "two practically and seriously inconsistent positions, one partisan and the other judicial," Ward, 409 U.S. at 60 quoting Tumey, 273

U.S. at 534, there is a denial of Due Process of Law for the defendant in such judicial proceeding. The decision of the Court of Appeals in this case in which the Court held that Petitioner Migliorini was in "two practically and seriously inconsistent positions, one partisan and the other judicial," and thus denied Respondent Due Process of Law is sound and consistent with this Court's rationale in *Tumey, supra* and *Ward, supra.*

IV. The Petitioners incorrectly claim that Petitioner Migliorini was not establishing official policy in deciding whether to hold and how to structure the Mayor's Court.

Petitioners City of Macedonia and Migliorini acknowledge that "the Mayor has had the discretion to decide whether or not to establish a Mayor's Court in the first instance." (Pet. p. 24) However, Petitioners incorrectly claim that Petitioner Migliorini was not establishing municipal policy when he decided whether to hold and how to structure the Mayor's Court.

The Court of Appeals properly followed this Court's decision in *Jett v. Dallas Independent School District,* 491 U.S. 701 (1989) in:

> identif[ying] those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.
> *Jett,* 491 U.S. at 737

and correctly found that the Mayor, having unfettered discretion under State Law as to whether or not to hold and how to structure a Mayor's Court, "speaks with final policymaking authority for the City of Macedonia concerning the functions of

the Mayor's Court." As the Court of Appeals correctly held that "[b]y virtue of the breadth of his executive powers and responsibilities, Mayor Migliorini lacked authority to preside over Mayor's Court", and thus denied Respondent DePiero due process of law, it was correctly decided that Petitioner Migliorini's decision to create and hold a Mayor's Court were official policymaking decisions for the City of Macedonia. Although Petitioner Migliorini was granted judicial immunity for his actions, this does not render the decision as to whether or not to hold and structure a Mayor's Court as anything other than official policymaking for the municipality.

Petitioners also incorrectly claim that the decision of the Court of Appeals as to municipal liability is in conflict with *Eggar v. City of Livingston*, 40 F.3d 312 (9th Cir. 1994), *cert. denied*, 515 U.S. 1136 (1995). In *Eggar, supra* at 314, the Court stated that the proper focus was "whether under state law the acts in question were performed under the municipality's or the state's authority" and acknowledged that "A city may be liable for a judge's acts if those acts are in accordance with city policy." *Eggar, supra* at 315. In denying municipal liability, the court held that "a municipality cannot be liable for judicial conduct it lacks the power to require, control, or remedy, even if that conduct parallels or appears entangled with the desires of the municipality." *Id.* at 316 (emphasis added). As Petitioners concede that Petitioner Migliorini "has the discretion to decide whether or nor to establish a Mayor's court in the first instance", they cannot argue that the City of Macedonia through its Mayor "lacks the power to require, control, or remedy" judicial conduct in the City of Macedonia Mayor's Court. As a result, *Eggar supra*, is distinguishable from the facts in this case where Petitioner Migliorini had the final and unfettered discretion as to whether to create and hold a Mayor's Court, and its rationale is consistent with the Court of Appeals decision holding Petitioner City of Macedonia liable as Petitioner Migliorini does have the final, unfettered discretion to control or remedy the constitutional defects in his creating and presiding over the City of Macedonia Mayor's Court.

REASONS FOR DENYING THE WRIT

This Court should decline jurisdiction as this case advances none of the objectives of Supreme Court Rule 10. Petitioners have failed to articulate any compelling reasons for this Court's review. Although Petitioners allege that the decision of the Appellate Court in this case conflicts with a decision of the Ohio Supreme Court and the Ninth U.S. Circuit Court, such claim is erroneous, as addressed and explained in this brief.

At the time of this Court's decision in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), seventeen states, including Ohio, used Mayor's Courts. With the Court of Appeals decision in this case, no State judicial system remains in the nation where a Mayor with wide executive powers as both the Chief Executive Officer responsible for the financial condition of the municipality and chief law enforcement officer responsible for enforcement of federal, state and municipal law, simultaneously sits and presides over Mayor's Court. As a result, this case has no national implication, application or effect.[7]

The decision of the Court of Appeals was a plainly correct application of the law and follows the rationale used in this Court's establishment of the legal standard that "Every procedure***" includes every time a person occupies "two practically and seriously inconsistent positions, one partisan and the other judicial," there is a denial of Due Process of Law. The decision of the Court of Appeals in this case in which the Court held that Petitioner Migliorini was in "two practically and seriously inconsistent positions, one partisan and the other judicial," and thus denied Respondent Due Process of Law is sound and consistent with this Court's rationale in *Tumey, supra* and *Ward, supra.*

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[7]Although Mayor's Courts do still exist in the State of Louisiana, it is the police chief who is the chief law enforcement officer for the municipality in those municipalities which have a mayor's court. (Louisiana Revised Statute 33 § 423)

CONCLUSION

For the reasons given above, the petition should be denied.

Dated: November 14, 1999.

Respectfully submitted,

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Louisiana Revised Statute 33:423

§ 423 Duties of marshal

A. The marshal shall be the chief of police and shall be ex officio a constable. He shall have general responsibility for law enforcement in the municipality, and shall be charged with the enforcement of all ordinances within the municipality and all applicable state laws. He shall perform all other duties required of him by ordinance. In those municipalities governed by the provisions of this Part, R.S. 33:321 et seq., which have a chief of police elected by the qualified voters thereof, he shall make recommendations to the mayor and board of alderman for appointment of police personnel, for the promotions of officers, to effect disciplinary action, and for the dismissal of police personnel. Such nominations or recommendations are to be made regardless of race, color, disability, as defined in R.S. 51:2232(11), or creed.

B. The provisions of Subsection A of this Section shall not be construed to limit or restrict the provisions of R.S. 33.423.3.